THE RULES

OF

LAW AND ADMINISTRATION

RELATING TO

WILLS AND INTESTACIES.

BY

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PREFACE.

The object of this Book is to state, concisely, the rules which should be known by all who administer the estates of deceased persons.

The difficulty of the subject is largely due to the fact that the English Law of Real Property is technical, obscure, and unsuited to the needs of a civilised nation. The Land Transfer Commissioners in their Report say (p. 53): "We may observe that land held for a term of 999 years at a peppercorn rent is, as the law stands, Personal Property: and the mere extension of this principle to land held in fee would by itself abolish nearly the whole of the artificial distinctions between Real Estate and Personal Estate which have been created by Act of Parliament and ancient custom with regard to methods of transfer and descent."

A one-section Act of Parliament which converted all estates in fee into long terms of years would simplify and improve the law in a high degree.

It would be possible to enact that land could be entailed as at present, and to extend this privilege to heirlooms and all other forms of property.

The Real Property Bill introduced last Session proposes to get rid of the scandal of copyholds and certain forms of tenure, but in other respects—*e.g.*, the three rules for the administration of insolvent estates—keeps the absurdities alive.

C. P. S.

New Square, Lincoln's Inn,
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RULES OF LAW AND ADMINISTRATION

RELATING TO

WILLS AND INTESTACIES.

PART I.

RULES OF LAW AND ADMINISTRATION.

INTRODUCTION.

All property may be disposed of by will.

English law differs from that of most other countries in the fact that it gives a practically unlimited power of disposition of property by will. A person clearly cannot dispose by will of an interest which ceases on his death; further, a joint tenant cannot by will deprive the other joint tenant of his right to take by survivorship, and a tenant in tail cannot by will defeat or dispose of the estates of the subsequent heirs in tail (*a*); but with these exceptions it is almost accurate to say that by virtue of sect. 3 of the Wills Act all property may be disposed of by will. Further, a man may by will be able to dispose of property which is not his, but over which he has a special or general power of appointment; and a general devise or bequest, in the absence of a contrary intention, is sufficient to exercise a general power of appointment. (Wills Act, s. 27.)

It follows that the law relating to wills is of the

(*a*) The Real Property Bill recently introduced proposes to give power to tenants in tail in possession to disentail by will.

greatest practical importance in this country. Wills are written documents; the testator's intention is determined by ascertaining what the written words, judicially interpreted, mean.

Wills are often obscure. In the case of certain ambiguities which frequently occur the course of judicial decisions, or sometimes statutory enactments (*e.g.*, sect. 29 of the Wills Act), have laid down certain rules of construction. A rule of construction always yields to a contrary intention expressed in the will, but, except in the case of five rules known as "presumptions," parol evidence of the testator's intention is not admissible to rebut or control a rule of construction. The nature of such rules is most excellently stated in the preface to Mr. Vaughan Hawkins' celebrated book as follows: "A rule "of construction may always be reduced to the following "form: Certain words or expressions which may mean "either *x* or *y* shall, *primâ facie*, be taken to mean *x*."

Rules of construction.

It often happens that a deceased person leaves a will which on the face of it is free from all obscurity or ambiguity. The testator's expressed intentions may, however, in such a case, fail to take effect either by reason of some rule of law or by reason of the state of the circumstances at his death. There is, therefore, a body of law which is applicable in cases where no difficulty arises on the face of the will. It is necessary that those persons who administer the estate of a deceased person should bear certain rules in mind.

A rule of law is a rule which always operates to defeat the intention of the testator as expressed in his will; it never yields to the expression, however emphatic, of a contrary intention. The rule in *Shelley's Case* and the rule against remoteness are familiar illustrations.

Rule of law always defeats expressed intention.

If, however, there is a difficulty caused by the state of facts, there is a series of rules, called rules of administration, which lay down what is to be done in the absence of a contrary intention expressed in the will. Thus, if the testator's estate is not sufficient to discharge his debts and at the same time to furnish all the specific and pecuniary

Rules of administration.

bequests, the question arises—Which of the bequests shall fail? for creditors must be paid. Here a rule of administration comes into play. It cannot be said to defeat the intention, for it is the state of facts which has prevented the expressed intention taking full effect; and if the testator has contemplated the possibility of his estate being insufficient he can express in his will his intention—for example, that his debts shall be borne in some order other than that laid down by the rules of administration. Such rules, therefore, apply to those cases where the testator has expressed no other intention.

Rules as to the legal interest.

There is, however, one type of rule which deals with the passing of the legal interest in property to the personal representatives which does not yield to expressed intention; but such rules, which are only laid down for the convenience of administration, do not affect the beneficial interests of legatees or devisees, and, therefore, do not affect what may be called the beneficial intentions of the testator.

Parol evidence not admissible to rebut a rule of administration.

Parol evidence of a contrary intention is not admissible to rebut a rule of administration.

Equitable rules as to election, &c.

There is, however, a further class of circumstances to be considered. Although the will is, on the face of it, unambiguous, the facts may cause a difficulty. For example, a testator leaves some specific property to A. and gives other property to B. It, however, proves to be the case that the property expressed to be given to A. really belongs to B.; so that the intention as expressed can only be carried out if B. is willing to "elect" that A. shall have B.'s property which is expressed to be given to A. Thus we get the equitable doctrine of election. There are other equitable doctrines—for example, that, *primâ facie*, a father does not mean to give a child a double portion—which lead to certain "presumptions" which are mentioned below. These equitable rules are analogous to rules of administration in so far as they profess to carry out what the testator would have done had he realised the actual state of facts at his death. These presumptions may be rebutted by parol evidence, but parol evidence is

Presumptions.

not admissible to rebut either a rule of construction or a rule of administration.

In the case of an "equivocation," parol evidence is admissible.

But the state of facts may give rise to a clear ambiguity. Thus, a testator gives a legacy to his nephew, John Brown; he has two nephews of that name. In such a case—an equivocation—parol evidence of intention is admissible.

This book treats solely of the elementary rules to be applied in the administration of the estates of deceased persons where on the face of the will (if any) there is absolutely no obscurity or ambiguity. If there is an ambiguity, it may, if it is one of a kind that has often occurred, be solved by some well-established rule of construction. Hawkins on Wills contains a statement of more than one hundred of the most important of such rules. If no well-established rule of construction is applicable, the personal representatives are not safe in acting without taking the opinion of the Court.

Parol evidence admissible to *explain* words of will, but not to show intention.

The subject of parol evidence is not treated, except incidentally, in this book. The general principle is stated by Farwell, L. J., in the following words: "In construing a will the Court has to ascertain not what the testator actually intended as distinguished from what his words have expressed, but what is the meaning of the words he has used. As Wigram on Extrinsic Evidence puts it, any evidence is admissible which in its nature and effect simply explains what the testator has written, and no evidence can be admissible which in its nature and effect is applicable for the purpose of showing what he really intended." (*Re Ofner*, [1909] 1 Ch. at p. 67.)

Presumptions.

In the case of "presumptions" it should be noted that the presumption raised by the Court of equity is against what the will says; consequently, the admissibility of parol evidence to rebut the presumption does not conflict with the preceding principle. These presumptions are (*b*):—

(1) A debt is satisfied by a legacy of equal or greater amount. (*Post*, Chap. VII.)

(*b*) See Hawkins on Wills at p. 15.

(2) A portion is satisfied by a legacy. (*Post*, Chap. VII.)

(3) Legacies of the same amount given with the same motive in different instruments are substitutional. (*Post*, Chap. VII.)

(4) An advance adeems a legacy given as a portion. (*Post*, Chap. VII.)

(5) A legacy to a sole executor or equal legacies to several executors deprives them of the undisposed-of residue. (*Post*, Chap. IX.)

Although, in general, a minor cannot make a will (Wills Act, s. 7), and wills must be in writing and signed by the testator in the presence of two witnesses present at the same time (Wills Act, s. 9), it should be remembered that soldiers on actual military service and mariners and seamen at sea can make wills of personal estate without these formalities (but subject to the provisions of the Navy and Marines (Wills) Acts, 1865 and 1897, and sect. 177 of the Merchant Shipping Act, 1894).

Wills of soldiers and seamen. Wills Act, s. 11.

It should also be remembered that a member of a friendly or industrial society or registered trade union may, by writing under his hand delivered at or sent to the registered office of such society, nominate any person to whom any moneys payable by the society on the death of such member, not exceeding 100*l.*, shall be paid on his decease, and may from time to time revoke or vary such nomination by a writing under his hand similarly delivered or sent; and on receiving satisfactory proof of the death of a nominator such society is bound to pay to the nominee the amount due to such deceased member, not exceeding the sum aforesaid. (Provident Nominations and Small Intestacies Act, 1883, s. 3; Industrial and Provident Societies Acts, 1893 to 1913.)

Testamentary nomination by members of friendly, &c. societies.

Where a person dies intestate or partially intestate the law determines how the property so undisposed of is to devolve, or, as it is sometimes expressed, the law makes a will for him. The rules in relation to this are dealt with in Part II. of this book.

Intestacy.

CHAPTER I.

THE RULE IN SHELLEY'S CASE.

Rule in *Shelley's Case.*

RULE. If land is limited in remainder to the heirs or heirs of the body of a person to whom a preceding estate of freehold is given, the words "heirs" or "heirs of the body" are words of limitation. (*Shelley's Case*, 1 Rep. 93 b; *Van Grutten* v. *Foxwell*, [1897] A. C. 658.)

Thus, if land is devised to A. for life, remainder to B. for life, remainder to the heirs of the body of A., A. takes an estate tail.

A short history of this celebrated rule will be found in Lord Macnaghten's judgment in *Van Grutten* v. *Foxwell* ([1897] A. C. at p. 668). Lord Mansfield's attempt (in *Perrin* v. *Blake*, 4 Burr. 2579) to subvert it gave rise to Mr. Fearne's great treatise on Contingent Remainders. The best short account of the rule is that in Chap. XIII. of Challis on Real Property. It is a rule of law which defeats the expressed intention.

The rule, as stated by counsel in 1 Rep. 104a, is, "It is a rule in law, when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail; that always in such cases (the heirs) are words of limitation of the estate, and not words of purchase."

Lord Davey's statement of the rule.

Lord Davey states the rule as follows:—

"Wherever an estate for life is given to the ancestor or propositus, and a subsequent gift is made to take effect after his death, in such terms as to embrace, according to the ordinary principles of construction, the whole series

of his heirs, or heirs of his body, or heirs male of his body, or whole inheritable issue taking in a course of succession, the law requires that the heirs, or heirs male of the body, or issue shall take by descent, and will not permit them to take by purchase, notwithstanding any expression of intention to the contrary." ([1897] A. C. at p. 684.)

Rule does not apply where one limitation is equitable and the other legal.

The rule applies to equitable as well as to legal limitations (*Richardson* v. *Harrison*, 16 Q. B. D. 85), but not where one limitation is legal and the other equitable. "Ever since the case of *Jones* v. *Lord Say and Seal* [3 Bro. P. C. 458] it has been considered, and perhaps there was no doubt of it before, that a legal estate in the ancestor and an equitable estate to the issue could not be united so as to increase the estate in the ancestor." (*Per* Lord Kenyon, C. J., in *Venables* v. *Morris*, 7 T. R. at p. 347; see also 16 Q. B. D. at p. 104.)

When part of the land is in mortgage.

It may happen that although on the face of the instrument creating the limitations one is legal and the other equitable, yet by reason of the legal estate being outstanding, as by reason of the property being subject to a mortgage, all the limitations are in fact equitable. It is not completely settled whether the rule applies in such a case. It may be observed that if part only of the estate was subject to a mortgage, the two parts of the estate would be subject to different limitations if the rule applied. Lord Cranworth, C., was clearly of opinion that the rule would not apply in such a case. "If a testator after devising, in the precise words used in this will, lands of which he was seised in fee, should mortgage a part for years and other part in fee, it is a strange proposition that the will should operate differently on the equity of redemption of the one and of the other. The argument of the defendant must go the length of contending that, though the owner of the legal fee may certainly, by means of a term of years and a limitation to trustees to preserve contingent remainders, give the beneficial interest for life to the first taker, and at his death to the heirs of his body as purchasers, yet that he cannot

by any means accomplish this if he has only the equitable fee. A proposition fraught, as it seems to me, with serious mischief. . . ." (*Coape* v. *Arnold*, 4 D. M. & G. at p. 587.)

On the other hand, in *Re White and Hindle's Contract* (7 Ch. D. 201, in which *Coape* v. *Arnold* was not cited) Malins, V.-C., held that where the property devised was subject to a mortgage so that the devise was of an equitable estate, the rule in *Shelley's Case* applied although the ultimate limitation to the heirs was legal in form. *Sed qu.*

The Land Transfer Act, 1897.

The effect of sect. 1 of the Land Transfer Act, 1897, may be to convert limitations which in form are legal into equitable limitations (prior to the assent by the executors), but it is submitted that this would not alter the construction of a will so as to attract the operation of a rule in cases where it would not have applied prior to the passing of the Act.

Estate—by implication

The estate of freehold in the ancestor may be given by implication (*Pybus* v. *Mitford*, 1 Vent. 372); nor does it affect the operation of the rule that the estate may terminate in the ancestor's lifetime. "The estate during widowhood is an estate of freehold; and the possibility, that it may terminate in the life of the widow, and before there can be an heir, is no objection." (*Per* Sir W. Grant, M. R., in *Curtis* v. *Price*, 12 Ves. at p. 99.)

or during widowhood.

Will and codicil.

For the purpose of the rule, a will and a schedule to it are one instrument (*Hayes* d. *Foorde* v. *Foorde*, 2 W. Bl. 698); and it can hardly be doubted that a will and a codicil are in the same case, for they together form the testamentary disposition of the deceased. It does not appear to be settled whether the rule applies where one limitation is in an instrument creating a power and the other is in an appointment in exercise of the power.

"Issue."

The rule applies where the word "issue" is used instead of "heirs of the body" (*Roddy* v. *Fitzgerald*, 6 H. L. C. 823), and in any other case where the words used are construed to mean "heirs of the body."

The great struggle has been to determine what expres-

sions used by the testator are sufficient to *explain*, upon a principle of construction known as the dictionary principle, that by "heirs" or "heirs of the body" the testator meant children or some other class not including the whole issue capable of taking by descent.

Context may *explain* "heirs" or "heirs of the body."

"The testator may conceivably shew by the context that he has used the words 'heirs,' or 'heirs of the body,' or 'issue' in some limited and restricted sense of his own which is not the legal meaning of the words—*e.g.*, he may have used the words in the sense of children, or as designating some individual person who would be heir of the body at the time of the death of the tenant for life, or at some other particular time." (*Per* Lord Davey in *Van Grutten* v. *Foxwell*, [1897] A. C. at p. 685.)

It seems to be settled as a rule of construction that the addition of words of limitation, or of distribution, or both, to "heirs of the body" is not sufficient to explain heirs of the body so that the words have other than their legal meaning. Thus, a devise to A. for life with remainder to the heirs of his body, share and share alike, their heirs and assigns, would vest in A. an estate tail. (*Jesson* v. *Wright*, 2 Bli. 1; Hawkins on Wills, 2nd ed. p. 226.)

Jesson v. *Wright.*

The word "issue" is less inflexible than "heirs of the body." Probably words of limitation alone are not sufficient to alter its legal meaning (see *per* Lord Cranworth, C., in *Parker* v. *Clarke*, 6 D. M. & G. at p. 109); on the other hand, "where words of distribution, together with words which would carry an estate in fee, are attached to the gift to the issue, the ancestor takes an estate for life only." (*Per* Bovill, C. J., in *Bradley* v. *Cartwright*, L. R. 2 C. P. at p. 522.)

Context may *explain* "issue."

For these rules of construction, see Jarman on Wills, Chapters XLIX. and LI.; and Hawkins on Wills, Chapter XVI.

CHAPTER II.

PERPETUITIES AND REMOTENESS.

The old Rule against Perpetuities.

Although the Legislature in enacting the statute *De Donis Conditionalibus* intended that perpetual entails should be created, this intention was frustrated by the judges. Various other methods were then employed to create a perpetual entail or perpetuity. There is a good description of these contrivances or devices in the third Report of the Real Property Commissioners; but all these devices were held bad on the ground that they were in effect attempts to create a "perpetuity."

Meaning of "perpetuity."

"A perpetuity is the settlement of an estate or an interest in tail, with such remainders expectant upon it, as are in no sort in the power of the tenant in tail in possession, to dock by any recovery or assignment." (*Per* Lord Nottingham in the *Duke of Norfolk's Case*, 3 Ch. Cas. at p. 31.)

Fearne's statement.

Fearne states the principle thus: "Any limitation in future, or by way of remainder, of lands of inheritance, which in its nature tends to a perpetuity, even although there be a preceding vested freehold, so as to take it out of the description of an executory devise, is by our Courts considered void in its creation." (C. R. p. 503.)

In the same way perpetual trusts of personal property, except in favour of a charity, were held to be bad.

This general principle may be stated as follows:—

Rule against perpetuities.

Rule. Every disposition (except in favour of a charity) which tends to make property inalienable for an indefinite period is void. (*Re Dutton*, L. R. 4 Ex. Div. 54.)

Thus, all attempts to create an unbarrable estate tail are void.

Other examples of perpetuities.

In *Re Parry and Daggs* (31 Ch. D. 130) the testator devised land to his son and his heirs, and declared that in case his son should die without leaving lawful issue [which was held to refer to death at any time] the land should go to the son's next heir-at-law. Fry, L. J., said: "From the earliest times the Courts have always leant against any device to render an estate inalienable. It is the policy of the law always to make estates alienable, and it is immaterial by what device it is attempted to prevent an owner from exercising the power of ownership"—and held that the device was illegal and the gift over void.

In *Parfitt* v. *Hember* (L. R. 4 Eq. 443) Lord Romilly, M. R., commences his judgment by saying, "I think that in this will an intention is shown to give a series of life estates in perpetuity to the issue of the nephews and niece," and he applied the doctrine of *cy-près*. (See below as to this.)

Trusts of personal property.

So, trusts of personal property for a non-charitable purpose, which prevent the property from being alienable during an indefinite period, are void. Thus, "a gift of a sum of money for the repair of a grave or tomb without reference to the distinction whether in a church or not, is void, not being a charity." (*Per* Kindersley, V.-C., in *Hoare* v. *Osborne*, L. R. 1 Eq. at p. 587.) So, a gift to provide an annual prize for sport is bad as a perpetuity (*Re Nottage*, [1895] 2 Ch. 649); but the Courts have striven to hold that gifts for useful objects are charitable and not within the rule against perpetuities. (See *Re Good*, [1905] 2 Ch. 60; *Re Donald*, [1909] 2 Ch. 410.)

Repair of grave.

Cy-près.

Cy-près.—Where the *general* intention of a testator is to devise his land so that it will descend through a series of issue as an estate tail, and his *particular* intention is to prevent any person from having power to alienate the property, and so create a perpetuity which is void, there

is a rule of construction known as *cy-près*, "by which you sacrifice the particular intent to the general intent, or the subordinate intent to the paramount intent." (*Per* Jessel, M. R., in *Hampton* v. *Holman*, 5 Ch. D. at p. 190.) Farwell, J., has approved Professor Gray's statement of the rule, which is as follows: "When land is devised to an unborn person for life, remainder to his children in tail, either successively or as tenants in common with cross remainders, the unborn person takes an estate tail; and when land is devised to an unborn person for life, remainder to his sons in tail male, either successively or as tenants in common with cross remainders, the unborn person takes an estate tail male. This is called the doctrine of *cy-près*." (*Re Mortimer*, [1905] 2 Ch. at p. 506.) On this rule of construction, see Hawkins on Wills, Chapter XVI., and Jarman on Wills, 6th ed. Chapter X.

The Rule in Whitby *v.* Mitchell.

By the middle of the 18th century it was clear that all devices to create perpetual entails would be held bad under the old rule against perpetuities.

Suggested origin of the rule.

"Every conveyancer had to bear it in mind as a rule which made it useless to attempt to tie up land by limiting it to an unborn person for life; such a limitation would of course be good in itself, but as it could not be followed by any limitation to the issue of the unborn person, it would be quite useless for the purpose of a strict settlement. Hence it is easy to see how the old rule against perpetuities ceased to be stated as a general rule forbidding the creation of unbarrable entails, and came to be stated in the form of a working rule for conveyancers, forbidding the limitation of land to the children of an unborn person, as purchasers, in succession to their parent." (Mr. C. Sweet, at p. 207 of Vol. III. of the *Columbia Law Review*.) This working rule is known as the rule in *Whitby* v. *Mitchell*. The existence of the rule is denied by Professor Gray (see *Law*

Quarterly Review, Vol. XXIX. p. 26), but it is established in this country.

RULE. A limitation of land to an unborn person, with remainder to the children of such unborn person, is void as to the remainder to the children. (*Whitby* v. *Mitchell*, 44 Ch. D. 85; *Re Nash*, [1910] 1 Ch. 1; *Monypenny* v. *Dering*, 2 D. M. & G. 145.)

Rule in *Whitby* v. *Mitchell.*

The rule applies to equitable as well as to legal contingent remainders (*Re Nash*, [1910] 1 Ch. 1); and where the limitation in remainder is created by an appointment under a special power. (*Re Nash, supra.*)

The rule does not apply to executory limitations or to personal estate. (*Re Bowles*, [1902] 2 Ch. 650.)

Cadell v. *Palmer.*

When it had been finally established that every attempt to create a perpetuity (in the sense in which that word was used in the 17th and 18th centuries) would fail, it remained doubtful how far by means of trusts and executory devises and bequests it was possible to tie up property. Gradually a new rule was evolved, but its precise form was not settled until 1833. This rule is now usually referred to as the rule against perpetuities, or the rule against remoteness, but it must be remembered when reading old cases or text-books that references to "perpetuities" are not references to this comparatively modern rule. The rule may be stated as follows, but it is subject to some exceptions.

The modern rule against remoteness.

RULE. Every executory interest in property which does not vest indefeasibly within a period of one or more lives in being and twenty-one years afterwards is void. (*Cadell* v. *Palmer*, 1 Cl. & Fin. 372.)

Rule in *Cadell* v. *Palmer.*

For the purposes of the rule a child *en ventre sa mère* is considered as a life in being. (*Ib.*; *Re Wilmer's Trusts*, [1903] 2 Ch. 411.) In applying the rule, possible and not actual events have to be considered. It is not sufficient that the property actually vests indefeasibly within the period, if possibly it might not have done so.

Possible not actual event to be considered.

"There are two well-known rules of law applicable to the vesting of all executory trusts and limitations, which are so thoroughly established as to admit of no exception or contradiction to their authority. The one is, that the executory trust or limitation not only *may* but necessarily *must* take effect (if it takes effect at all) within the period of a life or lives in being, and twenty-one years after, with a sufficient allowance in addition for the birth of a posthumous child. The other rule is, that if, at the time of its creation, the limitation is so framed, as not, *ex necessitate*, to take effect within the prescribed period, that is, if it is bad in its inception, it will not become valid by reason of the happening of subsequent events which may bring the time of its actual vesting and taking effect within the period prescribed by law." (*Per* Tindal, C. J., in *Dungannon* v. *Smith*, 12 Cl. & Fin. at p. 612.)

"That question has always been investigated by looking to the state of things as it was at the testator's death; and if, at that time, the whole might be too remote, then you could not rectify it, by looking to the way in which the events actually turned out at any later time." (*Per* Selborne, C., in *Pearks* v. *Moseley*, 5 A. C. at p. 722.)

"A will takes effect at the death of a testator, and any gift made by it is void for remoteness if it does not necessarily take effect within twenty-one years from the termination of any life then in being." (*Per* Jessel, M. R., in *Hale* v. *Hale*, 3 Ch. D. at p. 645.)

Limitation by reference.

If land is limited by will to A. for life, and after his death to the uses to which the X. estate shall then stand limited, this is good (although at the date of the testator's death it is not known what the limitations will be), if the limitations of the X. estate at A.'s death are in

fact such that, if read into the will, they would not be void for remoteness. (*Re Fane,* [1913] 1 Ch. 404.)

Woman past child-bearing.

In applying the rule, it must be assumed that a woman, no matter how old she be, is capable of child-bearing. (*Re Dawson,* 39 Ch. D. 155.)

Gifts to a class.

Gifts to a class.—Since the rule requires that the interests are indefeasibly vested, it is not sufficient in the case of gifts to a class that the maximum number of the class must be ascertained within the period, each share must be ascertained.

"The rule . . . is that the limitation must be such that every member of the class, where it is a question of a class gift, must of necessity take within the time allowed." (*Per* Chitty, J., in *Re Dawson,* 39 Ch. D. at p. 164.)

"A gift is said to be to a 'class' of persons, when it is to all those who shall come within a certain category or description defined by a general or collective formula, and who, if they take at all, are to take one divisible subject in certain proportionate shares; and the rule is, that the vice of remoteness affects the class as a whole, if it may affect an unascertained number of its members." (*Per* Lord Selborne, C., in *Pearks* v. *Moseley,* 5 A. C. at p. 723; see *Re Mervin,* [1891] 3 Ch. 197.)

If, however, the shares of certain members of the class must be definitely ascertained within the period, it seems that the gift is good as to these shares. (*Re Moseley's Trusts,* L. R. 11 Eq. 499.)

Interests must be indefeasibly vested within the period.

The interests taken by the beneficiaries must be indefeasibly determined within the period, it is not sufficient that the persons who take are ascertained within the period so that they could together make a good title to the property.

Thus, in *Re Hargreaves* (43 Ch. D. 401), Cotton, L. J., said: "It is very true that after the decease of the tenants for life the children could have disposed of their interests, vested and contingent, so that (apart from the question of the validity of the limitations) the estate

might have been disposed of as soon as the tenants for life were dead, and it may be contended that as the alienation of the estate is not prevented the case is not within the rule as to remoteness. But that is not the true way of looking at it. An executory limitation to take effect on the happening of an event which may not take place within a life in being and twenty-one years, is not made valid by the fact that the person in whose favour it is made can release it." (P. 405.)

"The question may be stated in the simplest possible manner. A marriage settlement is made in the usual form, and with the usual power of appointment among the children of the marriage. An appointment is made by the husband and wife by a direction to the trustees of the settlement to hold the trust fund upon trust to pay each daughter, as and when she marries, a sum of 1,500*l.*, and, subject to that, disposing of the rest of the trust fund, or not disposing of it, or appointing part of it to some of the children, and leaving the remainder to go as in default of appointment. The question is, whether this is good, seeing that the daughters may marry more than twenty-one years after the death of the survivor of the husband and wife, and that until a daughter marries it is necessarily left uncertain what will be taken by the other children, and what is to be taken by them under the appointment or under the provisions of the settlement if there be no appointment. That seems to be obnoxious to the rule against perpetuities . . . and it appears to me that, on principle, the appointment is bad." (*Per* Kekewich, J., in *Re Gage*, [1898] 1 Ch. at p. 504.)

Limitation depending on prior void limitation is bad.

Limitation depending on void limitation.—"Any limitation depending or expectant upon a prior limitation which is void for remoteness is invalid." (*Per* Stirling, J., in *Re Abbott*, [1893] 1 Ch. at p. 57.)

But if a limitation following one which is too remote, can take effect independently of the void limitation, it may be good, as a gift in default of appointment where

the power to appoint is bad. (*Re Abbott*, [1893] 1 Ch. 54.)

Interests, if vested, need not fall into possession within the period.

Vested interest in reversion.—It is not necessary that the interests should vest in possession within the period. Thus, if a testator give a life interest to his son, and on the son's death a life interest to any widow the son may leave, and on her death the capital to the son's children, this is good, although the son may marry a woman who was unborn at the testator's death, and she may outlive the son by more than twenty-one years. For the interests of the son's children vest at his death, and the interest of the widow vests at the same time. The testator could have given the corpus to the widow on the death of the son, and therefore he can give her a smaller interest.

But if the testator had given a discretionary trust for the maintenance of the son's widow and children during the life of the widow, this would have been bad. (See *Re Blew*, [1906] 1 Ch. 624.)

Vested remainder may fail under the old rule.

Vested remainder.—It is evident that a vested remainder cannot offend against the rule against remoteness, but it may offend against the old rule against perpetuities, and be void on that account. (*Re Mortimer*, [1905] 2 Ch. 502—the reference to remoteness in the headnote is erroneous.)

Reversionary leases.

Reversionary leases.—There is a difference of opinion whether a reversionary lease can be granted to commence at a date beyond the period fixed by the rule. Upon the principle that a vested interest cannot be void for remoteness, such a lease would seem to be good. The matter is discussed in the *Solicitors' Journal*, Vol. 50, p. 760.

Restraint on anticipation.

Restraint on anticipation.—The rule applies to a restraint upon anticipation (*Re Game*, [1907] 1 Ch. 276); but if the rule is infringed in this way, the restraint is held to be void, and the legatee or devisee takes the interest free from the restraint. (*Re Teague's Settlement*, L. R. 10 Eq. 564.)

Negative covenants.

Negative covenants.—Negative covenants, easements and charitable gifts are not within the rule. (See *per* Jessel, M. R., in *L. & S. W. Rail. Co.* v. *Gomm*, 20 Ch. D. at p. 583; *Mackenzie* v. *Childers*, 43 Ch. D. 265.)

Special power.

Powers of appointment.—"A special power which, according to the true construction of the instrument creating it, is capable of being exercised beyond lives in being and twenty-one years afterwards is, by reason of the rule against perpetuities, absolutely void; but if it can only be exercised within the period allowed by the rule, it is a good power, even although some particular exercise of it might be void because of the rule." (*Per* Parker, J., in *Re De Sommery*, [1912] 2 Ch. at p. 630.)

Thus, the ordinary power in a marriage settlement under which the spouses or the survivor of them can appoint among the issue of the marriage, is good, because the power can only be exercised within the period given by the rule; if an appointment is made which infringes the rule, the appointment is bad.

Power to appoint to issue.

"It does not follow that because the original power might have been badly exercised, yet, if it is so exercised as not to infringe the rule, the possibility of its being exercised in another way would make the power void. Power to appoint amongst issue *primâ facie* means indefinite issue, and might include persons beyond the line, but the question in all cases is what has been done." (*Per* Lord Cairns, C., in *Slark* v. *Dakyns*, L. R. 10 Ch. at p. 39.)

Special power capable of being exercised after the period is bad.

On the other hand, if the donee or donees of the power are not necessarily ascertained within the period, the power is bad. Thus, in *Re Hargreaves*, where a testator gave a power of appointment to the longest liver of her two sisters and their children, Cotton, L. J., said: "In my opinion the power to appoint is void for remoteness. This power is given to the last survivor of the sisters and their children. The children might not all be in being at the death of the testatrix; the power, therefore, is not given to a person who must necessarily be ascer-

tained within the period allowed by the rule against perpetuities." (43 Ch. D. at p. 405.)

The special power is read into the instrument creating the power, and the period allowed by the rule begins at the time of such instrument coming into operation.

"Where . . . the will under consideration is made in exercise of a special power of appointment, the question whether an estate or interest appointed by it be too remote depends upon its distance from the creation, not from the exercise, of the power. In other words, the period within which estates and interests limited by the appointment made in exercise of a special power must vest, does not begin from the death of the person exercising the power, but, if such power was created by a will, from the death of the original testator." (*Per* Joyce, J., in *Re Thompson*, [1906] 2 Ch. at p. 202.)

General powers.

In the case of general powers of appointment the period is calculated from the date of the execution of the power, on the principle that a general power is in effect equivalent to ownership. In *Re Powell's Trusts* (39 L. J. Ch. 188), James, V.-C., held that a general power to appoint by will only was not in effect equivalent to ownership, and consequently that where such a power was exercised the period must be calculated, not from the death of the testator exercising the power, but from the date when the instrument creating the power came into operation. Chitty, J., in *Rous* v. *Jackson* (29 Ch. D. 521), and North, J., in *Re Flower* (55 L. J. Ch. 200), have held, on the contrary, that in such a case the period runs from the death of the testator exercising the power. The subject is discussed in articles in the *Harvard Law Review*, reprinted in the *Law Times Journal*, Vol. 134, p. 287, and Vol. 135, p. 493.

Trust for sale.

Trusts for and powers of sale, &c.—Trusts and powers are subject to the rule. Thus, a trust for sale is not good if it may not arise until after the period allowed by the rule (*Goodier* v. *Edmunds*, [1893] 3 Ch. 455; *Re Wood*, [1894] 3 Ch. 381; *Re Bewick*, [1911] 1 Ch. 116); but

it may nevertheless be the case that, in spite of this, the beneficial interests are determined within the period, and do not fail. (*Re Daveron*, [1893] 3 Ch. 421.)

Power divisible.

Sometimes a power is divisible into two powers, one of which is good while the other is bad.

"Where the settlor has used language from which the Court may fairly infer that he contemplated the creation, not of a single power, but of two distinct powers, one of which only is open to objection because of the rule against perpetuities, the Court will avoid the latter only and will give effect to the power which is not open to this objection." (*Per* Parker, J., in *Re De Sommery*, [1912] 2 Ch. at p. 631.)

Contingent remainders.

Legal contingent remainders.—The question whether the rule applies to legal contingent remainders has recently been agitated. At one time the law was clear. The Real Property Commissioners never imagined that legal remainders were subject to the rule. (Third Report, pp. 29 and 30.) In 1842 Lord St. Leonards said: "It is now perfectly settled, that where a limitation is to take effect as a remainder, remoteness is out of the question." (*Cole* v. *Sewell*, 4 Dr. & War. at p. 28; 2 H. L. C. 186; see also *Abbiss* v. *Burney*, 17 Ch. D. 211.) The late Mr. Challis thought that the question ought never to have arisen. "It implies an anachronism which may be said to trench upon absurdity." (Real Property, 3rd ed. p. 197.)

Re Frost.
Re Ashforth.

But Kay, J., in *Re Frost* (43 Ch. D. 246), and Farwell, J., in *Re Ashforth* ([1905] 1 Ch. 535), in spite of the anachronism, have expressed the opinion that the rule against remoteness applies to legal contingent remainders. If these decisions are followed, the law will have been changed without the assistance of the Legislature. Is it possible that the Contingent Remainders Act, 1877, may have altered the position?

"It must be borne in mind that judges are very ready to extend the rule against perpetuities; and that, though the historical argument against extending the rule to legal

limitations cannot easily be answered, it can easily be disregarded." (Challis, Real Property, 3rd ed. p. 200.)

Equitable remainders.

Equitable contingent remainders.—In the matter of equitable contingent remainders, equity did not follow the law (*Abbiss* v. *Burney*, 17 Ch. D. 211); and they are subject to the rule.

Common Law conditions.

Common law conditions.—Another question which has recently arisen, is whether common law conditions are subject to the rule. In 1833 they were not. The Real Property Commissioners recommended that the law should be altered. (Third Report, pp. 36, 69.) The Legislature has not carried out this recommendation. Nevertheless, Byrne, J., in *Re Trustees of Hollis Hospital and Hague's Contract* ([1899] 2 Ch. 540) held that such a condition in a deed dated in 1726 was obnoxious to the modern rule, and his decision has been followed by Eve, J. (*Re Da Costa*, [1912] 1 Ch. 337.) If these decisions are followed, the recommendation of the Real Property Commissioners will have been carried in effect.

Limitation after an estate tail.

Limitations subsequent to an estate tail.—By virtue of the Statute *De Donis Conditionalibus* (13 Edw. I. c. 1), entails were perpetual, but since the decision in *Taltarum's Case* (Year Book, 1472, 12 Edw. IV. 19) estates tail and the remainders and reversions expectant upon them could be barred by a common recovery, or since the Fines and Recoveries Act, 1833, by a deed made and enrolled in compliance with the terms of that Act. It has accordingly been held that an executory limitation which must take effect during or immediately after the determination of an estate tail is good.

"No limitation after estates tail is . . . too remote; and it appears to us clear that, whether the limitation be directly to a class of issue to be ascertained at the determination of the estate tail, or a gift to a trustee for such class, or upon trust to convey to such class, or to sell and to divide the produce amongst such class, is wholly im-

material, if the legal and beneficial interests should be both ascertainable at the moment of the determination of the estate tail." (*Per* James, L. J., in *Heasman* v. *Pearse*, L. R. 7 Ch. at p. 282; see also *Re Haygarth*, [1912] 1 Ch. 510.)

Executory limitations in default of issue.—Where a person dies after the 10th August, 1882, sect. 10 of the Conveyancing Act, 1882, establishes the following rule of law:—

Conveyancing Act, 1882, s. 10.

RULE. Where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years, of the class on default or failure whereof the limitation over was to take effect. (Conveyancing Act, 1882, s. 10.)

"It is not clear that the provisions of this enactment apply to executory limitations in defeasance of an equitable fee simple. It is still less clear that they apply to executory limitations of a trust of a term of years." (Challis, Real Property, 3rd ed. p. 179.)

Real Property Amendment Act, 1845.

Note on contingent remainders.—Legal contingent remainders in freeholds failed if the contingent remainder did not take effect in possession immediately on the determination of the particular estate. By sect. 8 of the Real Property Amendment Act, 1845, it is enacted that "A contingent remainder, existing at any time after the 31st day of December 1884, shall be, and, if created before

the passing of this Act, shall be deemed to have been capable of taking effect, notwithstanding the determination, by forfeiture, surrender, or merger, of any preceding estate of freehold in the same manner, in all respects, as if such determination had not happened." This got rid of the necessity for trustees to support contingent remainders, but did not prevent the contingent remainder from failing if it did not immediately come into possession at the time of the natural expiration of the particular estate on which it depended. (*White* v. *Summers*, [1908] 2 Ch. 256.) The law was further amended by the Contingent Remainders Act, 1877 (2nd August, 1877), as follows: "Every contingent remainder created by any instrument executed after the passing of this Act, or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation."

Contingent Remainders Act, 1877.

Equitable contingent remainders were never liable to fail for want of a preceding estate of freehold. (*Re Brooke*, [1894] 1 Ch. 43; *Abbiss* v. *Burney*, 17 Ch. D. 211.)

Equitable remainders.

CHAPTER III.

ACCUMULATIONS.

In consequence of the remarkable will of Mr. Thellusson, the Accumulations Act, 1800 (usually called the Thellusson Act), has enacted the following rule of law:—

Period during which accumulation is permitted.

Rule. Any direction in a will to accumulate for a period longer than—

(1) twenty-one years from the death of the testator, or

(2) the minority or respective minorities of any person or persons who are living or *en ventre sa mère* at the death of the testator, or

(3) the minority or respective minorities only of any person or persons who under the trusts of the will would for the time being, if of full age, be entitled to the income directed to be accumulated—

is void so soon as the period is exceeded unless the direction for accumulation is for the purpose of paying debts, providing portions for the children of the testator or of any person taking an interest under the will, or relates to the produce of timber or wood. (The Accumulations Act, 1800.)

The Thellusson Act.

"No person or persons shall, after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any

real or personal property, so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated; for any longer term than the life or lives of any such grantor or grantors, settler or settlers; or the term of twenty-one years from the death of any such grantor, settler, devisor, or testator; or during the minority or respective minorities of any person or persons who shall be living, or *en ventre sa mère* at the time of the death of such grantor, devisor, or testator; or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances, directing such accumulation would, for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated: and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed." (Accumulations Act, 1800, s. 1.) The Thellusson Act. Sect. 1.

"Provided always, that nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settler, or devisor, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settler or devisor, or any child or children of any person taking any interest, under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements; but that all such provisions and directions shall and may be made and given as if this Act had not passed." (*Ib.* s. 2.) Sect. 2.

"Devise" in the second section is not limited to gifts of real estate. (*Morgan* v. *Morgan*, 4 De G. & Sm. 164, 171—174.)

If a person is entitled to stop the accumulation as the

only person interested, the Act does not apply. (*Wharton* v. *Masterman*, [1895] A. C. 186.)

As to the destination of the income which is released by the operation of the Act, see Jarman on Wills, pp. 388 *et seq.*

"The statute . . . was not intended to operate, and does not operate, to alter any disposition made by the testator, except his direction to accumulate. Striking that out, everything else is left as before, and all the other directions of the will as to the time of payment, substitution, or any contingencies, are to take effect according to the true construction of the will, unaltered by the effect of the statute." (*Per* Lord Langdale, M. R., in *Eyre* v. *Marsden*, 2 Keen, at p. 574; quoted with approval by Thesiger, L. J., in *Weatherall* v. *Thornburgh*, 8 Ch. D. at p. 271.)

One of the periods only may be taken.

Only one of the periods mentioned in the Act may be chosen. On this Kekewich, J., in *Re Errington* (76 L. T. 616), said: "The Legislature has left me at large to apply one or other of those periods whichever will fit the case. What it has said, according to the cases about which there is no doubt is, that you cannot apply more than one, and that you must choose that one which fits the case. You are not to choose the one which will give the longest period of accumulation, you are not to choose the one which you may suppose would best effectuate the intention, but you are to take the one that actually fits the intention as declared."

"The fourth period mentioned in the Act is not confined to the case of persons born in the testator's or settlor's lifetime." (*Per* Neville, J., in *Re Cattell*, [1907] 1 Ch. at p. 573; affd. (1914) 1 Ch. 177.)

Trust may be void ab initio.

It should be remembered that a trust for accumulation which infringes the rule against remoteness is void *ab initio*. (*Scarisbrick* v. *Skelmersdale*, 17 Sim. 187.)

Accumulation for payment of debts.

Accumulation for payment of debts.—A mortgage raised to pay estate duty may be an incumbrance for the

discharge of which income may be accumulated beyond any of the periods. (*Re Baroness Llanover*, [1907] 1 Ch. 635.)

If the debts are paid there cannot be an accumulation (beyond the period permitted) for the purpose of recouping the capital applied in the payment of the debts. (*Re Heathcote*, [1904] 1 Ch. 826.)

The exception does not apply where there is only a power to apply accumulations in payment of debts. (*Re Cresswell*, 57 Sol. J. 578.)

What is a portion?

Accumulation for portions.—It is not easy to determine what is a portion within the meaning of the Act. In reference to this, Buckley, J., in *Re Stephens* ([1904] 1 Ch. at p. 327), observes: "Now, the meaning of the word 'portion,' as generally understood, is a sum of money secured to a child out of property either coming from or settled upon its parents. The benefit is none the less a portion, because it is given to all the children, including the eldest child, and not to younger children only. The question to be answered is whether the benefit to be taken by the children or some of them comes from their parents or out of property in which their parents take an interest."

On the other hand, "a direction to accumulate all a person's property to be handed over to some child or children when they attain twenty-one can never be said to be a direction for raising portions for the child or children." (*Per* Lord Cranworth, C., in *Edwards* v. *Tuck*, 3 D. M. & G. at p. 58.)

The cases on the subject are considered in Jarman on Wills, pp. 383 *et seq.*

Accumulation for purchase of land.

Accumulation for purchase of land.—Where the direction is for the purpose of the purchase of land only, the Accumulations Act, 1892 (which came into force on the 28th June, 1892), restricts the selection of the testator to the fourth of the four periods mentioned in the principal Act.

The Accumulations Act, 1892.

"No person shall, after the passing of this Act, settle or dispose of any property in such manner that the rents, issues, profits, or income thereof shall be wholly or partially accumulated for the purchase of land only, for any longer period than during the minority or respective minorities of any person or persons who under the uses or trusts of the instrument directing such accumulation would for the time being, if of full age, be entitled to receive the rents, issues, profits, or income so directed to be accumulated." (Accumulations Act, 1892, s. 1.)

This applies to wills made before but coming into operation after the passing of the Act. (*Re Baroness Llanover*, [1903] 2 Ch. 330.)

Saunders v. *Vautier*.

The principle of *Saunders* v. *Vautier* (Cr. & P. 240) is as follows:—

Saunders v. *Vautier*.

RULE. Where there is an absolute vested gift made payable at a future event, with direction to accumulate the income in the meantime, and pay it with the principal, the Court will not enforce the trust for accumulation in which no person has any interest but the legatee, or (in other words) the Court holds that a legatee may put an end to an accumulation which is exclusively for his benefit. (*Per* Lord Davey, in *Wharton* v. *Masterman*, [1895] A. C. at p. 198.)

"The principle of this Court has always been to recognise the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age:—unless during the interval the property is given for the benefit of another. If the property is once theirs, it is useless for the testator

to attempt to impose any fetter upon their enjoyment of it in full so soon as they attain twenty-one." (*Per* Page-Wood, V.-C., in *Gosling* v. *Gosling,* Johns. at p. 272; quoted by Lord Herschell, at [1895] A. C. p. 192.)

The principle applies where the legatee is a charity, unless (*semble*) the accumulations are to be settled as a capital endowment at a future time. (*Wharton* v. *Masterman*, [1895] A. C. 186, 200.)

CHAPTER IV.

MORTMAIN—CHARITIES.

Mortmain.

Devise of land to corporation void, unless authorised to hold land.

Rule. A devise of land to a corporation is void unless the corporation has a licence to acquire and hold land in mortmain or is authorised by statute to hold land in mortmain. (Mortmain and Charitable Uses Act, 1888, s. 1.)

Mortmain and Charitable Uses Act, 1888, s. 1.

"Land shall not be assured to or for the benefit of, or acquired by or on behalf of, any corporation in mortmain, otherwise than under the authority of a licence from Her Majesty the Queen, or of a statute for the time being in force, and if any land is so assured otherwise than as aforesaid the land shall be forfeited to Her Majesty from the date of the assurance, and Her Majesty may enter on and hold the land accordingly." (Mortmain and Charitable Uses Act, 1888, s. 1, sub-s. (1).)

The second sub-section of sect. 1 provides for the case where the land is held of a mesne lord.

Exemptions.

Sect. 6 of the Act permits an assurance by will of twenty acres for a public park, two acres for a public museum, and one acre for a school-house for an elementary school, and of personal estate to be applied in or towards the purchase of land for all or any of the same purposes only, provided that the will is executed twelve months before the testator's death, and is enrolled in the books of the Charity Commissioners within six months after the death.

Many public bodies are authorised to take and hold lands without a licence in mortmain. (See Tudor on

Charities, 4th ed. p. 473; and the Chronological Index to the Statutes, under "Mortmain.")

Company.

Under sect. 16 of the Companies (Consolidation) Act, 1908, a company incorporated under the Act may hold land, but (sect. 19) if the company is formed for the purpose of promoting art, science, religion, charity, or any other like object not involving gain, it must not hold more than two acres without the licence of the Board of Trade.

Public Trustee.

Trade union.

It may be mentioned that the Public Trustee, who is a corporation sole, has a licence in mortmain; also that land cannot be devised to a registered trade union, although it is not a corporation. (*Re Amos*, [1891] 3 Ch. 159.)

Devise to corporation when it has no head.

Many corporations have a head, *e.g.*, the mayor, where the corporate body is the mayor, aldermen, and citizens of a city; and if land is devised to a corporation of such a type, but at the time when the devise takes effect there is no head in existence, it is doubtful whether the devise can take effect. Thus, Dr. Whewell, the Master of Trinity College, Cambridge, wishing to devise to the college the land and buildings known as Whewell's Court, used the following form in his will: "Now, I do hereby give and devise unto the Master Fellows and Scholars of Trinity College aforesaid and their successors for ever or in case that devise would fail of effect in consequence of there being no Master of the said College at my death then to the persons who shall be the Senior Fellows of the said College at my decease and their heirs until the appointment of a Master of such College and from and after such appointment (being within twenty-one years after my death) to the Master Fellows and Scholars of the said College and their successors for ever the said buildings &c."

Dr. Whewell's will.

Charities.

Since August 5th, 1891, both land and impure personalty may be devised or bequeathed for charitable purposes, subject to the following rule:—

Land devised to a charity to be sold within one year.

RULE. Land devised to or for the benefit of any charitable use shall, notwithstanding anything in the will contained to the contrary, be sold within one year from the death of the testator or such extended time as the Court or the Charity Commissioners may determine, unless it is exempted by Law. (Mortmain and Charitable Uses Act, 1891, s. 5.)

Mortmain and Charitable Uses Act, 1891, s. 5.

"Land may be assured by will to or for the benefit of any charitable uses, but, except as hereinafter provided, such land shall, notwithstanding anything in the will contained to the contrary, be sold within one year from the death of the testator, or such extended period as may be determined by the High Court, or any judge thereof sitting at chambers, or by the Charity Commissioners." (*Ib.* sect. 5.)

Personalty directed to be laid out in land. *Ib.*, s. 7.

"Any personal estate by will directed to be laid out in the purchase of land to or for the benefit of any charitable uses shall, except as hereinafter provided, be held to or for the benefit of the charitable uses as though there had been no such direction to lay it out in the purchase of land." (*Ib.* sect. 7; see *Re Sutton*, [1901] 2 Ch. 640.)

Sect. 8 enables the Court or the Charity Commissioners to sanction the retention or acquisition of land. The time may be extended by the Court as often as it is desirable. (*Re Sidebottom*, [1901] 2 Ch. 1.)

Proceeds of sale of land.

A gift of the proceeds of sale of land is not affected by sects. 5 and 6 of the Act of 1891. (*Re Wilkinson*, [1902] 1 Ch. 841; *Re Sidebottom*, [1902] 2 Ch. 389.)

For the earlier law, see the Mortmain and Charitable Uses Act, 1888, and the statutes repealed by that Act.

Exemptions.

Where, however, there was an existing exemption under the Act of 1888, the provisions for the sale of land under the Act of 1891 do not apply. These exemptions are, first, those given by sect. 6 of the Act of 1888 above

referred to; secondly, assurances to or for the benefit of the Universities of Oxford, Cambridge, London, Durham, the Victoria University, the colleges within those universities, the Colleges of Eton, Westminster, and Winchester, and Keble College (sect. 7 of the Act of 1888); thirdly, various other statutory exemptions. (See Tudor on Charities, 4th ed. pp. 468 *et seq.*, and the Chronological Table and Index to the Statutes now in force (1896), sub tit. "Mortmain" and "Charity.")

Meaning of "land."

The definition of land in the Act of 1888 was repealed by the Act of 1891; it now includes "tenements and hereditaments, corporeal or incorporeal, of any tenure, but not money secured on land or other personal estate arising from or connected with land." (Mortmain and Charitable Uses Act, 1891, s. 3.)

Public Policy.

Gift against public policy void.

RULE. Devises and bequests for purposes which are against public policy are void. (*Thrupp* v. *Collett* (No. 1), 26 Bea. 125.)

Thus, in *Thrupp* v. *Collett*, where the bequest was of a sum of money to be applied in purchasing the discharge of persons committed to prison for non-payment of fines under the game laws, Romilly, M. R., said: "Looking at this bequest in a plain common-sense view, it is obviously calculated to encourage offences prohibited by the Legislature. This is against public policy, and the Court cannot carry such an object into effect." (26 Beav. at p. 128.) So, a trust to print and circulate a treatise inculcating the supremacy of the Pope is void as being against public policy. (*De Themmines* v. *De Bonneval*, 5 Russ. 288.)

Superstitious uses.

Gifts for superstitious uses are also, in general, void, unless there is a general charitable intention. "The policy of the Court will not permit the execution of a superstitious use; but the Court avails itself of the

general intention to give the property to charity, although the particular charity chosen by the founder be superstitious; and it effectuates that general charitable intention by devoting the fund to some other charitable purpose." (*Per* Sir J. Leach, M. R., 5 Russ. at p. 297.)

Thus, a bequest for masses for the repose of the testator's soul is superstitious and non-charitable, and therefore void in England. (*West* v. *Shuttleworth,* 2 My. & K. 684.)

CHAPTER V.

LAPSE—FAILURE.

The law does not, in general, permit a gift by will to a person who is dead at the time when the will takes effect.

Rule. Subject to the exceptions contained in sects. 32 and 33 of the Wills Act a devise or bequest in favour of a person who predeceases the testator is void. (*Elliot* v. *Davenport*, 1 P. Wms. 83.)

Dead person cannot take under a will.

This is so, although the devise or bequest may be to A., his heirs and assigns, or to A., his executors, administrators and assigns, as the case may be. (*Ib.*)

The exceptions contained in the Wills Act, 1837, are as follows:—

"Where any person to whom any real estate shall be devised for an estate tail or an estate in quasi-entail shall die in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will." (Sect. 32.)

Wills Act, s. 32. Devise of estate tail.

"Where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the

Wills Act, s. 33. Gift to issue of testator who predeceases leaving issue

death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will." (Sect. 33.)

In *Re Hensler* (19 Ch. D. 612), a father devised a freehold house to his son, and his residuary real estate upon trusts for the benefit of other persons. The son died in his father's lifetime leaving issue, having devised all his real estate to the father. Hall, V.-C., held that the son took the house, but died intestate as to it, so that the son's heir-at-law was entitled. (See also *Re Scott,* [1901] 1 K. B. 228.)

Sect. 33 does not apply to a class.

Gifts to a class.—It should be remembered that sect. 33 does not apply to gifts to a class where, apart from sect. 33, there would have been no lapse. There is a rule of construction that a devise or bequest to the children of the testator means *primâ facie* the children in existence at the testator's death. (Hawkins on Wills, Chapter VII.) Thus, if a man leaves his property equally among his children, and a child dies in the testator's lifetime leaving issue who survive the testator, sect. 33 is not applicable, and such child's issue, devisee, or next of kin would not take.

But if the testator leaves his property equally between his children A., B. and C., naming them, this is not a class gift (*Bain* v. *Lescher,* 11 Sim. 397), and if A. predeceases the testator, leaving issue living at the testator's death, sect. 33 would operate.

"The difference between a gift to named individuals, and a gift to a class, in reference to lapse, is firmly established. A gift by will to a class is taken, in Law and in Equity, to be a gift, where it is immediate, to those only who survive the testator; and, where it is not immediate but postponed, to be a gift to those only who survive the testator, or come into being before the period of distribution. Take gifts to children: when the gift is to a child named, and he dies in the testator's lifetime,

it fails to take effect, apart from the 33rd section. The reason of its thus lapsing is found in the ambulatory nature of a will, which does not come into operation until the testator's death; a deceased person cannot take under a will, just as a deceased person cannot take under a deed, which has an immediate operation. But where the gift is to children as a class, to take as tenants in common, a child dying in the testator's lifetime was excluded by the law as it stood before the passing of the Wills Act; and, according to the decisions already cited, the 33rd section does not apply, although the child leaves issue that survives the testator." (*Per* Chitty, J., in *Re Sir E. Harvey's Estate*, [1893] 1 Ch. at p. 570.)

Powers of appointment.

Powers of appointment.—Sect. 33 does not apply to gifts made in exercise of a special power of appointment (*Holyland* v. *Lewin*, 26 Ch. D. 266); but by reason of sect. 27 of the Wills Act it applies to gifts made in exercise of a general power. (*Eccles* v. *Cheyne*, 2 K. & J. 676.)

General power.

Where a person having a general power of appointment by will exercises it in favour of persons who predecease the testator, the question arises whether the persons entitled in default of appointment take. This depends upon the construction of the will. In *Re Boyd*, Romer, J., expressed the matter as follows: "The principle which has to be applied to all cases of this class is clear. I have to ascertain whether the donee of the power meant, by the exercise of it, to take the property dealt with out of the instrument containing the power for all purposes, or only for the limited purpose of giving effect to the particular disposition expressed. The difficulty lies in the application of the principle. The conclusion I have come to in the present case is that the testatrix has not by her will and codicils sufficiently indicated an intention to make this 5,000*l.*, the subject of the power, hers for all purposes, and that so far as concerns the lapsed shares they go as in default of appointment." ([1897] 2 Ch. at p. 235.)

Re Marten ([1902] 1 Ch. 314) is an instance where the testatrix was held to have exercised the power for all purposes.

Declaration not sufficient to prevent lapse.

Declaration against lapse.—The testator may provide against lapse by giving the property to some other person in the event of the original legatee or devisee predeceasing him, but a mere declaration against lapse is insufficient.

"The general law does not allow a legatee who predeceases the testator to take any benefit under his will. In that event the gift is said to lapse, with the consequence that it falls into residue, or if it is itself a share of residue, goes to the testator's next of kin. It is not competent to a testator to exclude the application of this rule of law, but the consequences of a lapse can be avoided by the substitution of some other legatee to take the legacy if the event which occasions the lapse occurs. Such a substitutionary gift is often introduced by a direction that the legacy is not to lapse but is to go to the substituted legatee. In such a case the introductory words are of course quite inoperative unless followed by the substitution of another legatee, but if so followed they are not construed as an attempt to exclude the rule of law as to lapse, but as indicating an intention to avoid the consequences which a lapse would otherwise entail by substituting another legatee." (*Per* Parker, J., in *Re Greenwood*, [1912] 1 Ch. at p. 396.)

Legacy to creditor

Exception.—A legacy to a creditor of his debt, which has been barred by time, takes effect, although the creditor predeceases the testator (*Williamson* v. *Naylor*, 3 Y. & C. Ex. 208; *Re Sowerby's Trust*, 2 K. & J. 630); and the same principle applies in certain other cases where the legacy is in discharge of a moral obligation. (*Stevens* v. *King*, [1904] 2 Ch. 30.)

"I think that the cases of *Williamson* v. *Naylor* [3 Y. & C. Ex. 208], *Philips* v. *Philips* [3 Hare, 281], and *In re Sowerby's Trust* [2 K. & J. 630], have established

the rule that if the Court finds, upon the construction of the will, that the testator clearly intended not to give a mere bounty to the legatee, but to discharge what he regarded as a moral obligation, whether it were legally binding or not, and if that obligation still exists at the testator's death, there is no necessary failure of the testator's object merely because the legatee dies in his lifetime; and therefore death in such a case does not cause a lapse." (*Per* Farwell, J., in *Stevens* v. *King*, [1904] 2 Ch. at p. 33.)

Charity *cy-près*.

Gifts to charities.—If a testator gives a legacy to a charitable institution which has ceased to exist, the legacy will be applied *cy-près* if there is a general charitable intention.

"There is one class of cases, in which there is a gift to charity generally, indicative of a general charitable purpose, and pointing out the mode of carrying it into effect; if that mode fails, the Court says the general purpose of charity shall be carried out. There is another class, in which the testator shews an intention, not of general charity, but to give to some particular institution; and then if it fails, because there is no such institution, the gift does not go to charity generally; that distinction is clearly recognised; and it cannot be said that wherever a gift for any charitable purpose fails, it is nevertheless to go to charity." (*Per* Kindersley, V.-C., in *Clark* v. *Taylor*, 1 Drew. at p. 644; quoted with approval by Lord Herschell, C., in *Re Rymer*, [1895] 1 Ch. at p. 31.)

Charitable gift for particular purpose.

And if a charitable gift is given for a particular purpose, which it is impossible to carry out, the gift fails, unless there is a paramount general charitable intention.

"First of all, we have a class of cases where, in form, the gift is given for a particular charitable purpose, but it is possible, taking the will as a whole, to say that, notwithstanding the form of the gift, the paramount intention, according to the true construction of the will, is to give the property in the first instance for a general

charitable purpose rather than a particular charitable purpose, and to graft on to the general gift a direction as to the desires or intentions of the testator as to the manner in which the general gift is to be carried into effect. In that case, though it is impossible to carry out the precise directions, on ordinary principles the gift for the general charitable purpose will remain and be perfectly good, and the Court, by virtue of its administrative jurisdiction, can direct a scheme as to how it is to be carried out. . . .

"Then there is the second class of cases, where, on the true construction of the will, no such paramount general intention can be inferred, and where the gift, being in form a particular gift,—a gift for a particular purpose—and it being impossible to carry out that particular purpose, the whole gift is held to fail." (*Per* Parker, J., in *Re Wilson*, [1913] 1 Ch. at p. 320.)

A charity does not cease to exist because its objects have been changed by the Court of Chancery or the Charity Commissioners (*Re Faraker*, [1912] 2 Ch. 488); or because it is converted by Act of Parliament into a body which is for all practical purposes identical. (*Re Magrath*, [1913] 2 Ch. 331.)

The law prevents an attesting witness from taking a benefit under a will.

Gifts to attesting witness void.

RULE. All gifts, beneficial devises or bequests to a person who attests the will, or to the wife or husband of such person, are void. (Wills Act, 1837, s. 15.)

This rule, which does not yield to any expression of a contrary intention, is enacted by sect. 15 of the Wills Act in the following terms:—

Wills Act, s. 15.

"If any person shall attest the execution of any will, to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except

charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void."

Will and codicil.

This only applies to the actual document which the witness attests, so that a legatee who attests a codicil does not lose a legacy given him by the will, although the codicil confirms the will, unless he also attested the will (*Tempest* v. *Tempest*, 2 K. & J. 642; *Re Marcus*, 57 L. T. 399); and this is so even if such witness is a residuary legatee, and the codicil revokes a legacy and so increases the amount of the residuary estate. (*Gurney* v. *Gurney*, 3 Drew. 208.) Further, if a will attested by a legatee is republished by a codicil not so attested, the legatee does not lose his legacy (*Anderson* v. *Anderson*, L. R. 13 Eq. 381), even if he subsequently attests a second codicil. (*Re Trotter*, [1899] 1 Ch. 764.)

Supernumerary witness.

It sometimes happens that a will is attested by more than two witnesses: if one of these is a legatee he will not lose his legacy if he did not sign as a witness. (*Randfield* v. *Randfield*, 30 L. J. Ch. 179, n.) Evidence is admissible to show this. Whether this point should be determined by the Court of Probate and the name of the legatee who apparently attested omitted from the probate, or whether the name should be included in the probate and the question of fact determined by a Court of construction, is not finally settled, but the latter appears to be the correct practice. (Jarman on Wills, p. 95.)

It seems that a person who attests the attestation of a marksman is considered to be an attesting witness. (*Wigan* v. *Rowland*, 11 Hare, 157.)

Solicitor.

A direction that a solicitor-trustee may make professional charges is a beneficial gift, and such a solicitor who attests loses his right to charge. (*Re Trotter*, [1899] 1 Ch. 764.)

For the purposes of construction, however, the gift to an attesting witness is not to be treated as if it were struck out of the will. "The proper way of dealing with these cases is first to construe the will, and ascertain what interests are given, and then to apply sect. 15 of the Wills Act." (*Per* Swinfen Eady, J., in *Aplin* v. *Stone*, [1904] 1 Ch. at p. 548.)

Legatee who kills testator.

It may be mentioned that a person who has feloniously killed the testator or intestate is not allowed to take any benefit under the will (*In bonis Hall, Hall* v. *Knight and Baxter*, [1914] 1 P. 1) or intestacy. (*In bonis Crippen*, [1911] P. 108.)

Disclaimer.

DISCLAIMER.—A legatee or devisee may disclaim a devise or bequest. The disclaimer may be by conduct.

"It is now established that a man's assent to a devise is presumed unless he disclaims, which may be by conduct as well as by record or by deed." (*Per* Lindley, L. J., in *Re Birchall*, 40 Ch. D. at p. 439.)

Two gifts in the same will.

A legatee to whom two separate gifts are made may take one and disclaim the other.

"It was never laid down, that because you refuse one benefit by a will, clogged with some burthen, therefore you are to be deprived of another benefit by the same will, unclogged with any burthen. Suppose a bequest to me of a house to live in, and afterwards in the same will a bequest of 100*l.*; and I find it inconvenient to live in the house: there is an intention of benefit to me, intending to give me more than I find it convenient to accept of: but that shall not deprive me of the other benefit." (*Per* Grant, M. R., in *Andrew* v. *Trinity Hall, Cambridge*, 9 Ves. at p. 534.)

Disclaimer of life estate.

But the two gifts must be separate, and not form one aggregate gift. (See *Re Hotchkys*, 32 Ch. D. 408, and the cases there referred to.)

Where a life estate is disclaimed the effect, generally,

is to accelerate the future interests. In *Re Young* ([1913] 1 Ch. 272), a trust legacy was given to A. for life, then to her son for life, and then over. A. refused to receive the income, but on her son's death asked that the future income should be paid to her. It was held that she was entitled to the income from her son's death; but this case does not decide whether a disclaimer can be retracted.

CHAPTER VI.

CONDITIONS.

Testators sometimes attach conditions to gifts; in some cases these conditions are inoperative. The law on this subject is difficult, and in some points uncertain.

Conditions against public policy void.

Rule. Conditions which are against public policy are void. (*Re Beard*, [1908] 1 Ch. 383; *Egerton* v. *Brownlow*, 4 H. L. C. 1.)

"It is a well-established rule of law that a condition against the public good, or public policy, as it is usually called, is illegal and void." (*Per* Lord Lyndhurst in *Egerton* v. *Brownlow*, 4 H. L. C. at p. 160.)

Not to enter military service.

Thus, a condition not to enter naval or military service (*Re Beard, supra*), or a condition that a woman shall cease to reside with her husband (*Re Moore*, 39 Ch. D. 116), is against public policy and void.

Nun.

But a condition that a person shall not become a nun or a member of a sisterhood (*Re Dickson's Trust*, 1 Sim. N. S. 37; *Wainwright* v. *Miller*, [1897] 2 Ch. 255); or a condition that a person shall not become a Christian (*Hodgson* v. *Halford*, 11 Ch. D. 959), is good, and not against public policy.

"All the instances of conditions against law in a proper sense, are reducible under one of these heads:—

"First, either to do something that is *malum in se* or *malum prohibitum*.

"Secondly, to omit the doing of something that is a duty.

"Thirdly, to encourage such crimes and omissions." (*Per* Parker, C. J., in *Mitchel* v. *Reynolds*, 1 P. Wms. at p. 189.)

Remoteness.—Conditions, other than common law conditions (see above, Chap. II. p. 21), may be void as infringing the rule against remoteness; but a condition under which property would pass from one charity to another is not bad on this ground (*Re Tyler*, [1891] 3 Ch. 252), even though the motive of the condition is to create a perpetual inducement to do a non-charitable act, *e.g.*, to repair a tomb (*ib.*); but this principle does not apply where the first limitation is to an individual. (*Worthing Corporation* v. *Heather*, [1906] 2 Ch. 532.)

Conditions void for remoteness.

"Conditions are either precedent or subsequent; in other words, either the performance of them is made to *precede* the vesting of an estate, or the non-performance to *determine* an estate antecedently vested." (Jarman on Wills, 1st ed. Vol. 1, p. 796.)

Conditions are precedent or subsequent.

It is a question of construction to determine the nature of the condition. The consequences which flow from conditions being void are not, as will be seen below, the same in the two cases.

RULE. A condition subsequent which is inconsistent with and repugnant to an estate or interest to which it is annexed is void. (*Bradley* v. *Peixoto*, 3 Ves. 324.)

Condition repugnant to an estate void

"I have looked into the cases that have been mentioned; and find it laid down as a rule long ago established, that where there is a gift, with a condition inconsistent with and repugnant to such gift, the condition is wholly void. A condition that tenant in fee shall not alien, is repugnant." (*Per* Arden, M. R., 3 Ves. at p. 325.)

Condition against alienating.

Absolute interests in personalty.—In *Bradley* v. *Peixoto* (*supra*), a condition against alienating personalty was held void.

Interests in personalty.

Bankruptcy.

Bankruptcy.—A condition subsequent to defeat an absolute estate or interest on bankruptcy is void.

"If an estate in fee simple is given by a will or other instrument, with a proviso which is in law a condition-subsequent defeating the estate on alienation or on bankruptcy, the condition is void." (*Per* Chitty, J., in *Re Machu,* 21 Ch. D. at p. 842.)

"The liability of the estate to be attached by creditors on a bankruptcy or judgment is an incident of the estate, and no attempt to deprive it of that incident by direct prohibition would be valid. . . . An incident of the estate given which cannot be directly taken away or prevented by the donor cannot be taken away indirectly by a condition which would cause the estate to revert to the donor, or by a conditional limitation or executory devise which would cause it to shift to another person." (*Per* Kay, J., in *Re Dugdale,* 38 Ch. D. at p. 182.)

Conditions restricting alienation of fee.

Estates in fee.—A condition attached to an estate in fee restrictive of alienation or of alienation in a particular manner (*Re Rosher,* 26 Ch. D. 801; *Corbett* v. *Corbett,* 14 P. D. 7) is void. In *Re Elliot* ([1896] 2 Ch. 353), a condition that if the devisee of an estate sold it certain sums should be paid out of the proceeds of sale was held void by Chitty, J., who said: "It appears to me that the testator has attempted to create a new kind of estate unknown to the law. The owner of property has as an incident of his ownership the right to sell and to receive the whole of the proceeds for his own benefit. But this testator says that if the owner sells a part only of the proceeds shall belong to her, and the residue shall go to other persons. This direction is, I think, repugnant and void. My opinion is based on the broad general principle of law" (p. 356).

Limited restriction on alienation.

But a limited restriction on alienation may be annexed to an estate in fee. In *Re Macleay* (L. R. 20 Eq. at p. 189), Jessel, M. R., discussed the authorities, and observed: "So that, according to the old books, *Sheppard's*

Touchstone being to the same effect, the test is whether the condition takes away the whole power of alienation substantially: it is a question of substance, and not of mere form. Now, you may restrict alienation in many ways. You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting it to a particular class of individuals, or you may restrict alienation by restricting it to a particular time." And held that a condition not to sell the land "out of the family" was good. In *Re Rosher* (26 Ch. D. 801), Pearson, J., criticised some of Sir G. Jessel's observations, saying, "If he means to assert that, provided you give a power to mortgage or lease, you may restrain the power to sell, all I can say is, that I most respectfully differ from him" (p. 819), and held that a restraint upon alienation *limited as to time* was bad.

In the course of the argument in *Churchill* v. *Marks* (1 Coll. 441), an eminent conveyancer, supposed to be Mr. Lee, Q.C., in answer to a question put to him by the Court, stated his opinion to be, that a gift to A. in fee, with a proviso that if A. alien in B.'s lifetime the estate shall shift to B. is valid; but see Pearson, J.'s elaborate judgment in *Re Rosher*, 26 Ch. D. 801.

Reversionary interest.

Reversionary interests.—A condition restricting alienation of a reversionary interest before it falls into possession, with a gift over, on such attempt to alienate is good. (See *Pearson* v. *Dolman*, L. R. 3 Eq. 315; *Re Porter*, [1892] 3 Ch. 481.)

Estates tail.

Estates tail.—The incidents which the law attaches to an estate tail cannot be restrained by a condition.

"If a man makes gift in tail on condition that the donee shall not commit waste, or that his wife shall not be endowed, or that the husband of a woman tenant in tail after issue shall not be tenant by the curtesy, or that tenant in tail shall not suffer a common recovery, these conditions are repugnant and against law, because by the gift in tail, he tacitly enables him to commit waste,

that his wife shall be endowed, and to suffer a common recovery." (*Sir Anthony Mildmay's Case*, 6 Rep. 41a; quoted by Kay, J., in *Re Dugdale*, 38 Ch. D. at p. 181.)

Life estate.

Life estates and annuities.—" Property cannot be given for life any more than absolutely, without the power of alienation being incident to the gift; . . . any mere attempt to restrict the power of alienation, whether applied to an absolute interest or to a life estate, is void, as being inconsistent with the interest given." (*Per* Turner, V.-C., in *Rochford* v. *Hackman*, 9 Hare, at p. 480.)

Conditional limitation.

On the other hand, a life estate can be limited until the happening of a certain event (*e.g.*, bankruptcy or an attempt to alienate).

" In the well-known case of *Rochford* v. *Hackman* (*supra*), Lord Justice Turner decided (and his decision has been followed again and again, and has never, that I know of, been dissented from), that if there be a gift of a life estate to A., and then a remainder over to other people, with a proviso that the life estate shall cease upon a certain event happening, that is not a clause of forfeiture, but it is a limitation till that event happens, and then over. The very same construction has been applied in a case of an annuity for life, the estate being given subject to that annuity." (*Per* Kay, L. J., in *Adams* v. *Adams*, [1892] 1 Ch. at p. 376.)

Annuity.

Where a testator directed that an annuity should be purchased for A., a condition that if A. should sell his annuity it should cease and fall into residue was held void (*Hunt-Foulston* v. *Furber*, 3 Ch. D. 285); but apparently such a condition may be made effectual by a gift over. (See *Roper* v. *Roper*, 3 Ch. D. at p. 721; and *Re Mabbett*, [1891] 1 Ch. at p. 713.)

Conditional limitation.

The distinction between a condition and a conditional limitation is sometimes refined. (See Chitty, J.'s judgment in *Re Machu*, 21 Ch. D. 838.)

Gift over on intestacy.

Gift over on intestacy.—"The law has said, that if a man dies intestate, the real estate shall go to the heir, and the personal estate to the next of kin, and any disposition which tends to contravene that disposition which the law would make is against the policy of the law, and therefore void." (*Per* Turner, L. J., in *Holmes* v. *Godson*, 8 D. M. & G. at p. 165; see *Shaw* v. *Ford*, 7 Ch. D. at p. 674.)

"It is a rule that, where a money fund is given to a person absolutely, a condition cannot be annexed to the gift, that so much as he shall not dispose of shall go over to another person." (*Per* Lord Truro, C., in *Watkins* v. *Williams*, 3 Mac. & G. at p. 629.)

"Whether the subject of the gift be real or personal property, a gift over in the event of the decease and intestacy of the party to whom an absolute interest is given by the will, is repugnant and void." (*Per* Page-Wood, V.-C., in *Barton* v. *Barton*, 3 K. & J. at p. 515.)

Restraint on anticipation.

Power of the Court.

Restraint on anticipation.—The law permits a married woman to be restrained from anticipation, but the restraint is only operative during coverture. By sect. 7 of the Conveyancing Act, 1911 (which repeals sect. 39 of the Conveyancing Act, 1881), "where a married woman is restrained from anticipation or from alienation in respect of any property or any interest in property belonging to her, or is by law unable to dispose of or bind such property or her interest therein, including a reversionary interest arising under her marriage settlement, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in such property."

The particular consequence of a condition being void may depend upon whether the condition is precedent or subsequent, whether the property to which it is attached

is real or personal, and whether there is a gift over on breach or non-performance of the condition.

If condition subsequent is void, gift is absolute.

RULE. If real or personal property is given subject to a condition subsequent which is void or becomes impossible of performance, the devise or bequest is absolute. (*Re Beard*, [1908] 1 Ch. 383.)

"The conditions to which I have referred are conditions subsequent, the object of the conditions being to determine and divest (upon the happening of the event specified) estates or interests antecedently vested. If, therefore, the condition be void as being contrary to public policy, the gift will be absolute both as regards the real and personal estate." (*Per* Swinfen Eady, J., in *Re Beard*, [1908] 1 Ch. at p. 386.)

Devise subject to void condition precedent is void.

RULE. If land is devised subject to a condition precedent which is void or becomes impossible to be performed, the devise is void. (Co. Lit. 206.)

"In case of a feoffment in fee with a condition subsequent that is impossible, the state of the feoffee is absolute: but if the condition precedent be impossible, no estate or interest shall grow thereupon." (Co. Lit. 206.)

Bequest subject to void condition precedent is good if condition impossible *ab initio* or involves *malum prohibitum*.

RULE. If personal property is bequeathed subject to a condition precedent which is void for involving *malum prohibitum*, or as being impossible *ab initio* the bequest is absolute (*Wren* v. *Bradley*, 2 De G. & S. 49); but where a condition involves *malum in se* or the condition has since become impossible by act of God, the bequest is void. (*Re Moore*, 39 Ch. D. 116; *Dawson* v. *Oliver Massey*, 2 Ch. D. at p. 755.)

"The doctrine that conditions precedent as well as conditions subsequent which are against the policy of the

law are treated as void in cases of legacies of personal estate, and that the legacy 'stands pure and simple,' is distinctly recognised by Lord Hardwicke in *Reynish* v. *Martin* [3 Atk. at p. 332]: and the rules borrowed from the Civil Law were held by the late Master of the Rolls to apply to a mixed fund of the proceeds of real and personal estate: *Bellairs* v. *Bellairs* [L. R. 18 Eq. 510]. I assume, therefore, that if this is to be treated as a legacy given upon a precedent condition or defeasible by a subsequent condition which is bad as involving that which is *malum prohibitum*, the legacy must take effect, discharged of the condition." (*Per* Kay, J., in *Re Moore*, 39 Ch. D. at p. 122.)

Effect of condition precedent being void.

"But with respect to legacies out of personal estate, the Civil Law, which in this respect has been adopted by Courts of Equity, differs in some respects from the Common Law in its treatment of conditions precedent; the rule of the Civil Law being that where a condition precedent is originally impossible, or is made so by the act or default of the testator, or is illegal as involving *malum prohibitum*, the bequest is absolute, just as if the condition had been subsequent. But where the performance of the condition is the sole motive of the bequest, or its impossibility was unknown to the testator, or the condition which was possible in its creation has since become impossible by the act of God, or where it is illegal as involving *malum in se*, in these cases the Civil agrees with the Common Law in holding both gift and condition void." (Jarman on Wills; quoted by Cotton, L. J., 39 Ch. D. at p. 128.)

In *Dawson* v. *Oliver Massey* (2 Ch. D. 753, at p. 755), Jessel, M. R., observes: "The rule is that where a condition precedent annexed to a legacy becomes impossible by the act of God, the legatee takes nothing. It is otherwise if the condition is a condition subsequent; there the legatee takes absolutely, because there is nothing to take the legacy away from him."

Condition impossible by act of God.

Restraint of marriage.

General restraint of marriage.—"It seems to have been laid down by a great number of cases that what is called a general restraint upon marriage is against the policy of the law. . . . A condition subsequently annexed by way of forfeiture to a marriage is therefore void. That is the law both as to man and woman." (*Per* James, L. J., in *Allen* v. *Jackson*, 1 Ch. D. at p. 403; see *Re Wright*, [1907] 1 Ch. 231.)

Condition in partial restraint of marriage.

RULE. Although a condition subsequent not to dispute a will or in partial restraint of marriage annexed to a bequest of personalty is *in terrorem* and void, yet it is valid and effectual if there is a gift over on breach of the condition. (*Cleaver* v. *Spurling*, 2 P. Wms. 526; *Re Whiting's Settlement*, [1905] 1 Ch. 96.)

It is not easy to ascertain what kinds of conditions in restraint of marriage are *in terrorem* only when annexed to gifts of personalty with no gift over.

Condition not to marry

The following conditions in partial restraint of marriage appear not to be void as against public policy:—

Scotchman,

(1) Conditions not to marry a person of a particular class, as a Scotchman (*Perrin* v. *Lyon*, 9 East, 170), or a papist. (*Duggan* v. *Kelly*, 10 Ir. Eq. R. 295.)

Christian,

(2) Conditions not to marry except one of a large class, as a Jew. (*Hodgson* v. *Halford*, 11 Ch. D. 959.)

except with certain ceremonies.

(3) Conditions not to marry except with certain ceremonies, as according to the rites of Quakers. (*Haughton* v. *Haughton*, 1 Moll. 611.)

Against re-marriage of widow.

(4) Conditions against the re-marriage of a widow. (*Lloyd* v. *Lloyd*, 2 Sim. N. S. 255.)

Second marriage of man.

(5) Conditions against the second marriage of a man. (*Allen* v. *Jackson*, 1 Ch. D. 399.)

(6) Conditions requiring consent to marriage.

Conditions requiring consent to marriage.

"It is an established rule in the Civil Law, and has long been the doctrine of this Court, that where a personal

legacy is given to a child on condition of marrying with consent, that this is not looked on as a condition annext to the legacy, but as a declaration of the testator *in terrorem*." (*Per* Lord Hardwicke, C., in *Reynish* v. *Martin*, 3 Atk. at p. 331; quoted by Stirling, J., in *Re Nourse*, [1899] 1 Ch. at p. 69.)

Annexed to land good without a gift over.

Such conditions are effectual in the case of personalty if accompanied by a gift over (*Re Whiting's Settlement*, [1905] 1 Ch. 96); but in the case of land such a condition subsequent is good, without a gift over, as a limitation. (*Fry* v. *Porter*, 1 Mod. 300.)

Condition precedent to marry with consent.

Conditions precedent to marry with consent also appear to be *in terrorem*, unless there is a gift over, except in the following cases:—

(i) Where there is a provision for the legatee in case the condition is not performed. (*Re Nourse*, [1899] 1 Ch. 63.)

(ii) Where the marriage with consent is only one of two events, in either of which the legatee would take the legacy. (*Re Brown's Will*, 18 Ch. D. 61.)

(iii) Where the consent is only required in case of marriage under age. (*Stackpole* v. *Beaumont*, 3 Ves. 89.)

Consent of parents to marriage.

Where the consent of parents is required, this apparently is construed as meaning the consent of the parents or parent, if any (*Dawson* v. *Oliver Massey*, 2 Ch. D. 753); but this doctrine does not extend to the case where the consent of guardians is required. (*Re Brown's Will*, 18 Ch. D. 61.)

Interest till marriage.

A life interest till marriage is, in general, good as a limitation, not as condition. (See above, p. 48.)

CHAPTER VII.

SATISFACTION—ADEMPTION.

Presumption against double portions.

BOTH satisfaction and ademption (in the sense in which the word is used in this chapter) arise from the presumption of Courts of Equity against double portions. Broadly, ademption resembles the revocation of a legacy; satisfaction is the discharge of an obligation by means of a legacy. These presumptions of equity may be rebutted by parol evidence.

Ademption of Legacies.

Legacy adeemed by an advance.

RULE. In the absence of a contrary intention, there is a presumption that an advance adeems a legacy given as a portion either wholly or *pro tanto*. (*Meinertzagen* v. *Walters*, L. R. 7 Ch. 670.)

"Where a father makes provision for his children, leaving them legacies, and afterwards gives a portion to one of those children, it is supposed, from what is known to be the ordinary intention of testators, that he did not intend to make any real difference between the children, and that the child advanced in his lifetime takes the advance *pro tanto* by way of ademption." (*Per* James, L. J., L. R. 7 Ch. at p. 672.)

But "a rule designed to produce equality among children cannot be extended so as to reduce their shares for the benefit of a stranger." (*Per* Swinfen Eady, J., in *Re Heather*, [1906] 2 Ch. at p. 234.)

This rule is not a rule of administration or of construction, but a mere presumption. (See Introduction, p. 3.)

Consequently it can be rebutted not merely by the words of the will, but by parol evidence; and if parol evidence is brought against the presumption, then parol evidence is admitted in support of it.

Presumption may be rebutted by parol evidence.

"In order to establish a case for the application of this rule as to double portions, there must be two matters, I think, made out, and it will be seen upon reflection that there are two presumptions really which are to be considered, and not one. In the first place, both of the suggested gifts or donations must be gifts in the nature of a portion. . . . But, supposing both gifts are gifts in the nature of portions, then comes a further question, for the solution of which a further presumption is invoked. That question is, whether it was intended that the former gift or portion should take the place of an advancement of the gift which is given by the will, and there the second presumption which is invoked has to be dealt with—a presumption to the effect that the former gift, the gift *inter vivos*, was intended as an advancement *pro tanto* of the gift under the bequest—a presumption, it is said, which ought to be made in favour of equality amongst children, it being the view of the law that equality is what the father, in dealing with his children, would, in most cases, presumably intend. This, like the former, is a presumption which may be rebutted. The circumstances may show that a gift given during the lifetime is not intended as an advancement of the bequest." (*Per* Bowen, L. J., in *Re Lacon*, [1891] 2 Ch. at p. 497.)

Legacy for a purpose adeemed by subsequent gift.

RULE. In the absence of a contrary intention there is a presumption that a legacy given for a particular purpose is adeemed by a gift made by the testator after the will for the same purpose. (*Re Pollock*, 28 Ch. D. 552.)

"The presumptions arising out of the parental relation do not of course extend to any case in which the legatee is a stranger to that relation. But numerous authorities

have determined that if a legacy appears on the face of the will to be bequeathed (though to a stranger) for a particular purpose, and a subsequent gift appears by proper evidence to have been made for the same purpose, a similar presumption is raised *primâ facie* in favour of ademption. And it is clear from the authorities, that evidence of the circumstances under which the subsequent gift was made including contemporaneous or substantially contemporaneous declarations of the donor (whether communicated to the donee or not) may be admissible in such a case." (*Per* Selborne, C., in *Re Pollock*, 28 Ch. D. at p. 556.)

Satisfaction of Portions by Legacies.

Legacy to a child is in satisfaction of a portion.

RULE. In the absence of a contrary intention, there is a presumption that a provision by a father's will for his child is to be taken in satisfaction, either wholly or *pro tanto*, of an existing obligation by the father to provide a portion. (*Thynne* v. *Glengall*, 2 H. L. C. 131.)

"Equity leans against double portions, and the general rule is that wherever a legacy given by a parent, or a person standing in *loco parentis*, is as great as or greater than a portion previously secured to the legatee upon marriage or otherwise, a presumption arises that the legacy was intended as a satisfaction of the portion. If the legacy is less than the portion, a presumption arises that it was intended as a satisfaction *pro tanto*." (*Per* Eady, J., in *Re Blundell*, [1906] 2 Ch. at p. 226.)

Stirling, J., has expressed the opinion that *primâ facie* a mother is not in *loco parentis* for the purpose of the rule against double portions. (*Re Ashton*, [1897] 2 Ch. at p. 578.)

A share of residue is on the same footing as a pecuniary legacy as regards the rule against double portions (*Thynne* v. *Earl of Glengall*, 2 H. L. C. 131);

but the presumption may be rebutted by differences in the nature of the property or in the mode in which it is to be enjoyed. (*Lord Chichester* v. *Coventry*, L. R. 2 H. L. 71; see Jarman on Wills, p. 1168, for details.)

It often happens that the persons interested under the settlement are not the same as those interested under the gift in the will, so that those who take nothing under the will cannot be held to have lost their benefit under the settlement.

"In cases of satisfaction, where the testator has first entered into a covenant to settle a sum of money upon his child for life, with remainder to the issue of the marriage, that covenant is not satisfied by a bequest of a like sum of money to that child absolutely; it is only satisfied *pro tanto*, that is, so far as the child is concerned. So also if the bequest be to the children of the marriage, omitting the parent, that may be a satisfaction of so much of the covenant as relates to them, but is no satisfaction of the covenant to the parent. Accordingly, in these cases, if the bequest be to the parent, the parent may elect, or if the bequest be to the children of the marriage alone the children may elect to take under the will, instead of taking under the covenant; but this cannot affect the rights of the other covenantees who take no interest under the will." (*Per* Lord Romilly in *Lord Chichester* v. *Coventry*, L. R. 2 H. L. at p. 92.) Election.

Where the covenantee takes no interest directly under the will, but is only derivatively interested, the doctrine of satisfaction does not apply. (*Re Blundell*, [1906] 2 Ch. 222.)

As the rule is a presumption, and not a rule of construction, parol evidence is admissible to rebut the presumption. Presumption may be rebutted by parol evidence.

"It is important not to relax the rule against admitting parol evidence to construe wills—that is, evidence to show what the will means. That you cannot do, unless there is a latent ambiguity—for instance, as to two legatees of the same name—or as to the meaning of terms of art. . . . Here there is a daughter and her family entitled to

a portion under a settlement, and then a will, in which you find a provision in favour of the same daughter and some of her family. You do not want to construe that; but the question arises, whether both portions are to be paid. You look at the will for some expression of intention whether one or both are to be paid. If you find no expression, then you are driven to a presumption of law, which only arises in the absence of an expressed intention to give a double portion. That is entirely independent of the construction of the will. When you come to a presumption to imply an intention in the will, then the rule always is that you may admit parol evidence to rebut such presumption." (*Per* Cotton, L. J., in *Re Tussaud's Estate*, 9 Ch. D. at p. 374.)

When parol evidence is adduced to rebut the presumption, parol evidence is admissible to support the presumption. (*Powys* v. *Mansfield*, 3 Myl. & Cr. 359.)

Parol evidence admissible to prove that testator is in *loco parentis*.

In cases of double portions parol evidence is admissible not only to rebut the presumption, but to prove the fact (which gives rise to the presumption) that the testator meant to put himself in *loco parentis*.

"If the acts of a party standing in *loco parentis* raise, in equity, a presumption which could not arise from the same acts of another person not standing in that situation, evidence must be admissible to prove or disprove the facts upon which the presumption is to depend, namely, whether, in the language of Lord Eldon, he had *meant* to put himself in *loco parentis;* and, as the fact to be tried is the intention of the party, his declarations, as well as his acts, must be admissible for that purpose." (*Per* Lord Cottenham, C., in *Powys* v. *Mansfield*, 3 Myl. & Cr. at p. 370.)

Covenant to leave money may be satisfied by intestacy.

Covenant to leave a sum of money.—A covenant to leave a sum of money or a specific share of the testator's estate may be satisfied by permitting a share of the estate of greater value than the amount to devolve under an intestacy on the covenantee. (*Blandy* v. *Widmore*, 1 P. Wms. 324; *Garthshore* v. *Chalie*, 10 Ves. jun. 1.)

This does not apply to a covenant to leave an annuity. (*Salisbury* v. *Salisbury*, 6 Hare, 526.)

"Where the husband has bound himself to fulfil some obligation by the payment of money or by doing an act equivalent to the payment of money at the time of his death (whether it be at the time of his death, or within six months after, makes no difference), that obligation is satisfied if, by dying intestate, he allows the law to confer a benefit on the covenantee equivalent to that which he had bound himself to confer" (*per* Shadwell, V.-C., in *Lang* v. *Lang*, 8 Sim. at p. 465); but it is otherwise where the covenant is to pay a sum in the lifetime of the covenantor. (*Ib.*)

Satisfaction of Debts by Legacies.

Debt is satisfied by a legacy.

RULE. In the absence of a contrary intention there is a presumption that a debt is satisfied by a legacy of equal or greater amount. (*Talbot* v. *Shrewsbury*, Pr. Ch. 394; *Re Rattenberry*, [1906] 1 Ch. 667.)

In *Talbot* v. *Shrewsbury* (*supra*), it was said that: "If one being indebted to another in a sum of money, does by his will give him a sum of money as great as, or greater than, the debt, without taking any notice at all of the debt, that this shall, nevertheless, be in satisfaction of the debt, so as that he shall not have both the debt and the legacy; but if such a legacy were given upon a contingency, which, if it should not happen, the legacy would not take place, in that case, though the contingency does actually happen and the legacy thereby became due, yet it shall not go in satisfaction of the debt; because a debt which is certain shall not be merged or lost by an uncertain and contingent recompense; for whatever is to be a satisfaction of a debt ought to be so in its creation, and at the very time it is given, which such contingent provision is not."

"The rule is that a legacy to a creditor of an amount equal to or greater than the debt is *primâ facie* to be

considered a satisfaction of the debt." (*Per* Eady, J., in *Re Rattenberry*, [1906] 1 Ch. at p. 670.)

Presumption may be rebutted:

by parol evidence,

This rule, like the previous ones, being only a presumption, parol evidence is admissible to rebut it, and then again in support of it. (*Re Horlock*, [1895] 1 Ch. 516, 523.)

by direction to pay debts.

There is a rule of construction that a direction in the will to pay debts and legacies (*Chancey's Case*, 1 P. Wms. 408), or to pay debts alone (*Re Huish*, 43 Ch. D. 260), rebuts the presumption.

If the debt was contracted after the will, it is clear that the legacy cannot have been intended to be in satisfaction of the debt. (*Thomas* v. *Bennett*, 2 P. Wms. at p. 343.)

Almost any difference between the debt and the legacy (except that the legacy is greater) is sufficient to rebut the presumption; but the fact that a legacy is, in general, not payable until twelve months after the testator's death is not enough to rebut the presumption. (*Re Rattenberry*, [1906] 1 Ch. 667, and the cases there referred to.)

Ademption of legacy by payment of debt.

If the testator pays off the debt he adeems a legacy of equal amount given in satisfaction of it.

"Though, no doubt, the Court is not disposed to hold there is satisfaction if it can help it, and has taken hold of slight circumstances to rebut the presumption against double portions, yet it is clearly established that if there is a legacy of equal amount with a debt, the creditor cannot take both the legacy and the debt unless there is something to take the case out of the general rule. In the present case there is nothing of the sort, and it seems to me that this legacy given by the codicil must be taken to have been given in satisfaction of the debt; and the presumption of law, in the absence of any evidence to rebut it, seems to me to put the matter in precisely the same position as if it had been stated in the codicil that the legacy was to pay the debt. That being so, the testator, having paid off the debt in his lifetime, his estate is relieved from the payment of the legacy." (*Per* North, J., in *Re Fletcher*, 38 Ch. D. at p. 376.)

CHAPTER VIII.

ELECTION (*a*).

TESTATORS sometimes, either intentionally or by mistake, affect to bequeath what they have in fact no power to dispose of; in such cases the Courts attach an equitable obligation to any benefits taken under the will by the owner of the property so dealt with, viz., that:—

A person cannot both take under a will and claim against it.

RULE. If a testator by will purports to give the property of A. to B., and gives property of his own to A., if A. will not confirm the gift to B., B. shall receive compensation out of the property given to A. (*Blake* v. *Bunbury*, 1 Ves. jun. at p. 523; *Dillon* v. *Parker*, 1 Sw. 359; *Gretton* v. *Haward*, *ib.* 409; *Schroder* v. *Schroder*, Kay, 578.)

Illustrations.

Thus, if a testator, having fee simple land and entailed land, devises the entailed to B. (a stranger) and the fee simple land to A., the heir in tail, A. must elect either to give up to B. the entailed land, or forfeit to him the whole or an equivalent part in value of the fee simple land. (See *Noys* v. *Mordaunt*, 2 Vern. 581.)

So, if under the old law, a testator devised the real estate of which he should be seised *at his death* (*Churchman* v. *Ireland*, 1 R. & My. 250; *Schroder* v. *Schroder*, Kay, 578), the heir, if taking benefits under the will, was put to election as regards after-acquired lands.

(*a*) Part of this chapter is taken from a MS. of the late Mr. Vaughan Hawkins.

So, if the testator, having purchased stock or shares in the joint names of himself and his wife by way of advancement, afterwards bequeaths the same specifically, the widow is put to election. (*Shuttleworth* v. *Greaves*, 4 My. & Cr. 35; *Grosvenor* v. *Durston*, 25 Beav. 97.)

Lord Eldon's statement of the principle.

"In our Courts we have engrafted upon this primary doctrine of election, the equity, as it may be termed, of *compensation*. Suppose a testator gives his estate to A. and directs that the estate of A., or any part of it, should be given to B. If the devisee will not comply with the provision of the will, the Courts of Equity hold that another condition is to be implied, as arising out of the will, and the conduct of the devisee; that inasmuch as the testator meant that his heir-at-law should not take his estate which he gives A., in consideration of his giving his estate to B.; if A. refuses to comply with the will, B. shall be compensated by taking the property, or the value of the property, which the testator meant for him, out of the estate devised, though he cannot have it out of the estate intended for him." (*Per* Lord Eldon in *Ker* v. *Wauchope*, 1 Bli. at p. 25.)

According to Jessel, M. R., the doctrine of compensation creates an equitable charge upon the property out of which the compensation is to be made. (*Pickersgill* v. *Rodger*, 5 Ch. D. 163.)

It is immaterial whether the testator supposed that he had, or knew that he had not power to dispose of the property in question. (*Re Harris*, [1909] 2 Ch. 206.)

The Court elects on behalf of infants.

Persons under a disability.—The Court elects on behalf of infants (*Re Montagu*, [1896] 1 Ch. 549). The ordinary practice is to direct an inquiry to ascertain which course is beneficial for the infant.

Married women.

In the case of married women under the old law the authorities are not consistent, but the better opinion seems to be that in such a case the Court will elect on her behalf. (*Cooper* v. *Cooper*, L. R. 7 H. L. 53.)

Powers of appointment.- But A. (the real owner) is put to election only by bounty proceeding from the

testator himself, and not by an appointment under a special power; in the latter case Equity cannot lay hold of the appointed property so as to compensate B. (*Bristow* v. *Warde*, 2 Ves. jun. 336; *Re Fowler's Trust*, 27 Beav. 362.) Thus, if under a power to appoint to children the testator appoints part to them and the remainder to a grandchild, the children may claim both under the appointment to them and the rest as unappointed. Special power of appointment.

Where there is an appointment which is void as infringing the rule against remoteness or the rule in *Whitby* v. *Mitchell* (*supra*, Chap. II.), and a gift to the person entitled in default of appointment, there was a difference of opinion as to whether a case of election arose. Mr. Theobald, in the preface to the seventh edition of his book on Wills, argued with great force that there must be a case of election, but in *Re Nash* ([1910] 1 Ch. 1), following certain earlier decisions, the Court of Appeal held that in such a case the person taking in default of appointment is not put to his election. In *Re Oliver's Settlement* ([1905] 1 Ch. at p. 197), Farwell, J., said: "The doctrine of election is a rule of equity by virtue of which the Court of Equity compels a recipient of the testator's bounty to conform to all the legal provisions of the will. It is somewhat startling that this Court should be asked to extend it to illegal provisions, and to apply its doctrines for the purpose of enabling a testator to evade a rule of law founded on public policy. . . . Kekewich, J., has said, and it is the basis of his judgment, that it is immaterial whether the appointment fails because it offends some rule of law, or because it offends the construction of the power. With all deference to him, the difference appears to me to be vital. In the one case the testator openly and avowedly breaks the general law, and asks the Court of Equity to participate in his illegal act by giving effect to it; in the other he merely attempts to exceed the limits set to his power by the donor thereof in the particular case—limits which the donor might have extended without any breach of general law. Thus, limitations which infringe the rule against perpetuity are No election where gift void for remoteness.

void on the face of the will, but a devise of Blackacre by a testator who has no interest therein is not illegal, nor is it void on the face of the will, but depends on an inquiry into the testator's title." It should be noticed that in this case the appointment was also bad because the appointees were not objects of the power.

Adeemed gift does not raise an election.

Adeemed gift.—A gift which is afterwards adeemed or revoked cannot raise a case of election; thus, where the testator, under the old law, specifically devised an estate contracted to be purchased, and afterwards took a conveyance to uses to bar dower, so that the devise was inoperative, the heir was not put to election. (*Plowden* v. *Hyde*, 2 Sim. N. S. 171.)

What terms of gift raise an election.

What terms of gift raise an election.—The intention of the testator to dispose of that which is not his own must clearly appear to raise a case of election. (See *Wintour* v. *Clifton*, 8 De G. M. & G. 641.) Thus, a devise of "all my real estate wheresoever situate" does not put a Scotch heir to election. (*Maxwell* v. *Maxwell*, 2 De G. M. & G. 705; *Allen* v. *Anderson*, 5 Hare, 163.) So a bequest of "all my funded property or estate whatsoever" was held not to put the widow to election as to stock standing in the joint names of the testator and herself, although at the date of the will the testator had no other funded property. (*Dummer* v. *Pitcher*, 2 My. & K. 262; so *Maddison* v. *Chapman*, 1 Jo. & H. 470—a devise of "all my real and personal property at B., L. or elsewhere," the testator having only a lien on an estate at L. purchased by his wife.)

And a specific devise imports, *primâ facie*, a devise subject to existing charges, and does not put incumbrancers or portionists to election. (*Stephens* v. *Stephens*, 1 De G. & J. 62.) In *Stephens* v. *Stephens* the testator, being tenant for life with remainder to trustees for 1,000 years, to raise 10,000*l.* for younger children, remainder to A. in tail, devised the estate to A. in fee: but it was held that the younger children were not put to election.

But it is settled that a specific gift of property in which the testator has only an undivided share puts a co-owner to election, as a gift of "my messuage" or "farm" at A. (*Padbury* v. *Clark*, 2 Mac. & G. 298; *Howells* v. *Jenkins*, 2 J. & H. 706), or "cottages" (*Miller* v. *Thurgood*, 33 Beav. 496), or shares (*Shuttleworth* v. *Greaves*, 4 My. & Cr. 35), or *present* funded stock. (*Grosvenor* v. *Durston*, 25 Beav. 97.)

Reversionary interest.

Where there is a specific gift of property in which the testator has only a reversionary interest, the question is on the whole will whether the testator intends to dispose of the whole interest, or of the reversion only. (*Wintour* v. *Clifton*, 21 Beav. 447; 8 De G. M. & G. 641; *Lord Rancliffe* v. *Parkyns*, 6 Dow, 149; *Welby* v. *Welby*, 2 V. & B. 187; *Usticke* v. *Peters*, 4 K. & J. 437.) If the will subjects the property along with property belonging to the testator in possession, to powers of jointuring, charging, &c., exerciseable only when the devisees should be in possession of *the whole* (*Wintour* v. *Clifton*), or if the property is specially made the fund to secure an annuity immediately payable (*Usticke* v. *Peters*), a case of election arises.

Parker, J.'s statement.

The general principle is thus stated by Parker, J.: "To raise a case of election under a will it must, I think, be reasonably clear from the will itself, having regard only to the circumstances under which it was made, and excluding evidence of intention (*a*), that the testator intended to dispose of property which in fact was not his own. Whether he knew it was not his own is, it seems to me, immaterial. Where the property is sufficiently identified on the face of the will no difficulty arises. Where the property is only described in terms more or less general, a case of election can seldom be raised, and even where at the date of the will the testator had no property of his own falling within the general description the gift may, at any rate since the Wills Act,

(*a*) The dictum of Jessel, M. R., in *Pickersgill* v. *Rodger* (5 Ch. D. at p. 170), seems to be incorrect.

1837, have been meant to pass any after-acquired property falling within the general description." (*Re Harris*, [1909] 2 Ch. at p. 209.)

No election between different clauses of the will.

"The rule as to election is to be applied as between a gift under a will and a claim *dehors* the will, and adverse to it, and is not to be applied as between one clause in a will and another clause in the same will." (*Per* James, V.-C., in *Wollaston* v. *King*, L. R. 8 Eq. at p. 174.)

When compensation ascertained.

The amount of compensation is to be ascertained as at the time of the death of the testator. (*Re Hancock*, [1905] 1 Ch. 16.)

Class.

The method of working out the compensation where the property belongs to a class and the testator purports to give it to some members of the class and to strangers will be found in *Re Booth*, [1906] 2 Ch. 321.

Two wills.

If a testator leaves two wills dealing with his property in two different countries, they together form one testamentary disposition for the purpose of the doctrine of election. (*Douglas-Menzies* v. *Umphelby*, [1908] A. C. 224.)

The doctrine of compensation does not apply to the case of a person electing to take under the instrument which gives rise to the election. (*Re Lord Chesham*, 31 Ch. D. 466.)

Election where Portions are satisfied by Legacies.

Since the person entitled to the benefit of an obligation cannot be compelled to renounce it, we have the following rule:—

Where portion is satisfied by a legacy, legatee may elect against the will.

RULE. Where a gift by will is in satisfaction of an existing obligation binding on the testator to provide a portion, the person entitled to the benefit of the obligation may elect to take the benefit under it rather than the gift under the will. (*Thynne* v. *Glengall*, 2 H. L. C. 131.)

"When a father, on the marriage of a child, enters into a covenant to settle either land or money, he is

unable to adeem or alter that covenant, and if he give benefits by his will to the same objects, and states that this is to be in satisfaction of the covenant, he necessarily gives the objects of the covenants the right to elect whether they will take under the covenant, or whether they will take under the will." (*Per* Lord Romilly, in *Lord Chichester* v. *Coventry*, L. R. 2 H. L. at p. 91.)

Only those who take under the will are put to election.

No case for election arises in the case of such of the objects who benefit under the preceding covenant, but do not take a benefit under the will.

"In cases of satisfaction, where the testator has first entered into a covenant to settle a sum of money upon his child for life, with remainder to the issue of the marriage, that covenant is not satisfied by a bequest of a like sum of money to that child absolutely; it is only satisfied *pro tanto*, that is, so far as the child is concerned. So, also, if the bequest be to the children of the marriage, omitting the parent, that may be a satisfaction of so much of the covenant as relates to them, but it is no satisfaction of the covenant to the parent.

"Accordingly in these cases, if the bequest be to the parent, the parent may elect, or if the bequest be to the children of the marriage alone, the children may elect to take under the will instead of taking under the covenant; but this cannot affect the rights of the other covenantees who take no interest under the will." (*Per* Lord Romilly in *Lord Chichester* v. *Coventry*, L. R. 2 H. L. at p. 92; see *Re Vernon*, 95 L. T. 48.)

CHAPTER IX.

PERSONAL REPRESENTATIVES.

ALTHOUGH the various rules of administration, so far as they affect the beneficial interests to be taken under a will, yield to a contrary intention expressed in the will, it is not possible for the testator to prevent his estate (except legal interests in copyholds and certain customary freeholds) from vesting in his personal representatives, and at the present time it is a rule that—

Deceased's estate, except copyholds, vests in the personal representatives.

RULE. The whole of the estate of the deceased (other than legal interests in land of copyhold tenure or customary freeholds in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant) vests in the personal representative or representatives of the deceased. (Ingpen on Executors, p. 200.)

Personalty vests in the executor.

The personal estate always vested in the personal representatives or representative.

"The position of an executor is a peculiar one. He is appointed by the will, but then, by virtue of his office, by the operation of law and not under the bequest in the will, he takes a title to the personal property of the testator, which vests him with the *plenum dominium* over the testator's chattels." (*Per* Lord Haldane, C., in *Attenborough* v. *Solomon*, [1913] A. C. at p. 82.)

Trust and mortgage estates.

Since the year 1881, by virtue of sect. 30 of the Conveyancing Act, 1881, trust and mortgage estates of the deceased, "notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time," but this

does not apply to land of copyhold or customary tenure vested in the tenant on the court rolls on trust or by way of mortgage. (Copyhold Act, 1894, s. 88, re-enacting sect. 45 of the Copyhold Act, 1887.)

Real estate. Land Transfer Act, 1897.

In the case of deaths after the year 1897, the real estate of the deceased, except legal interests in copyholds and certain customary freeholds, vests in his personal representatives or representative.

"Where real estate is vested in any person without a right in any other person to take by survivorship, it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him." (Land Transfer Act, 1897, s. 1 (1).)

"The expression 'real estate,' in this part of this Act, shall not be deemed to include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant." (*Ib.* s. 1 (4).)

Equitable interests in copyholds.

The Land Transfer Act, 1897, s. 1, applies to equitable interests in copyholds. (*Re Somerville and Turner's Contract*, [1903] 2 Ch. 583.)

Does the Act bind the Crown?

Exception.—In *In b. Hartley* ([1899] P. 40), it was held by Jeune, P., that the Land Transfer Act, 1897, did not bind the Crown, so that if the deceased dies intestate without an heir, his real estate does not vest in his personal representative. (*Sed qu.* See *Wentworth* v. *Humphrey*, 11 A. C. 619, which was not cited in *In b. Hartley*.)

Where a special power of appointment is exercised by will, the property the subject of the power does not form part of the testator's assets, but where the power is general we have:—

Property appointed by will under a

RULE. All property (other than legal interests in land of copyhold tenure or customary freeholds

general power vests in the executors.

in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant) over which a person executes by will a general power of appointment, vests in the personal representatives or representative of the deceased. (Land Transfer Act, 1897, s. 1 (2); *Re Hadley*, [1909] 1 Ch. 20.)

"In the present case we have to deal with property over which the testator had a general power of appointment which was executed by the will. It is unquestioned law that such property passes to the executor and not to the appointee." (*Per* Fletcher Moulton, L. J., [1909] 1 Ch. at p. 33.)

Note.—It should be remembered that some powers are neither general nor special. (See Jarman on Wills, p. 789, and *Re Byron's Settlement*, [1891] 2 Ch. 474.)

Powers of Executors and Trustees.

Executor may sell or mortgage personalty.

RULE. The personal representative of the deceased has power to sell or mortgage any part of the deceased's personal estate. (*Vane* v. *Rigden*, L. R. 5 Ch. 663.)

"It is a general rule of law and equity, that an executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate; and that they cannot be followed by creditors, much less by legatees, either general or specific, into the hands of the alienee. The principle is, that the executor or administrator, in many instances, *must* sell, in order to perform his duty in paying debts, &c.: and no one would deal with an executor or administrator, if liable afterwards to be called to account." (Williams on Executors, 10th ed. p. 700.)

"The general rule both of law and equity is clear, that an executor may dispose of the assets of the testator; that over them he has absolute power; and that they cannot be followed by the testator's creditors. It would be monstrous if it were otherwise; for then no one would deal with an executor." (*Per* Lord Mansfield, C. J., in *Whale* v. *Booth*, 4 T. R. 625.)

"As long ago as the case of *Scott* v. *Tyler* [2 Dick. 712, 725] Lord Thurlow expressed his opinion clearly to be that the executor is at liberty either to sell or to pledge the assets of the testator. In fact, he has complete and absolute control over the property, and it is for the safety of mankind that it should be so; and nothing which he does can be disputed, except on the ground of fraud or collusion between him and the creditor." (*Per* Lord Hatherley, C., in *Vane* v. *Rigden*, L. R. 5 Ch. at p. 668.)

Executor selling or mortgaging presumed to be acting in that capacity.

"It appears to me that I have the high authority of Lord Cairns and Lord Cranworth for saying that where a person who fills the position of an executor is found selling or mortgaging part of his testator's estate, he is to be presumed to be acting in the discharge of the duties imposed on him as executor, unless there is something in the transaction which shows the contrary; and further, that the contrary is not made out merely from the circumstance that the conveyance or mortgage does not purport to be executed by him in that capacity." (*Per* Stirling, J., in *Re Venn and Furze's Contract*, [1894] 2 Ch. at p. 114.)

Executor residuary legatee.

"I think it is settled law that, if an executor who is also residuary legatee sells or mortgages an asset of the testator for valuable consideration to a person who has no notice of the existence of unsatisfied debts of the testator, or of any ground which rendered it improper for the executor so to deal with the asset, that person's purchase or mortgage is valid against any unsatisfied creditor of the testator." (*Per* Romer, J., in *Graham* v. *Drummond*, [1896] 1 Ch. at p. 974.)

One executor may act on behalf of all.

The powers of personal representatives over the personal estate of the deceased may, in general, be exercised by one of several executors or administrators.

"Co-executors, however numerous, are regarded in law as an individual person; and, by consequence, the acts of any one of them, in respect of the administration of the effects, are deemed to be the acts of all." (Williams on Executors, 10th ed. p. 715.)

"Nothing is clearer than this, and I never knew it questioned in case of executors, that each executor has the entire control of the personal estate of testator, may release, or pay a debt, or transfer any part of testator's property, without concurrence of the other executor. It has indeed been questioned in case of administrators, whether one administrator had such a power equal to that of executor. . . . [But in *Willand* v. *Fenn*] it was held in B. R. after three arguments, that one administrator stood on the same ground and foundation with one executor." (*Per* Sir J. Strange, M. R., in *Jacomb* v. *Harwood*, 2 Ves. sen. at p. 267.)

"It is a settled principle with respect to the power of executors, that any one of several executors may settle an account with a person accountable to the estate, and that such settlement is binding on the other executors." (*Per* Romilly, M. R., in *Smith* v. *Everett*, 27 Beav. at p. 454.)

Exceptions. Transfers of stock or shares.

Exception.—There are, however, various exceptions to the general principle. Thus, one of two executors cannot make a valid transfer of shares or stock registered in the names of both in a company subject to the provisions of the Companies Clauses Act, 1845. (*Barton* v. *North Staffordshire Railway Company*, 38 Ch. D. 458.)

Under sect. 29 of the Companies (Consolidation) Act, 1908, "A transfer of the share or other interest of a deceased member of a company made by his personal representative shall, although the personal representative is not himself a member, be as valid as if he had been a member at the time of the execution of the instrument

of transfer." Ingpen (on Executors, p. 224) says: "It would seem that one of two executors who are noted as executors, but not registered as shareholders, may validly effect a transfer."

By sect. 23 of the National Debt Act, 1870, the Bank of England or of Ireland may require all the executors who have proved the will to join in a transfer of Consols. Consols.

Powers over real estate.—Where the deceased died after the year 1897, the personal representatives have the like powers over the real estate (other than copyholds and customary freeholds) of the deceased as they have over chattels real of the deceased, except that all the personal representatives must concur in selling or transferring it. Powers of personal representatives over real estate. All must concur.

"All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, and as respects the payment of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him, save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the Court, to sell or transfer real estate." (Land Transfer Act, 1897, s. 2, sub-s. (2).) Land Transfer Act, 1897, s. 2 (2).

As regards dispositions made after the year 1911, "Where probate is granted to one or some of several persons named as executors, power being reserved to the others or other to prove, the sale, transfer or disposition of real estate may, notwithstanding anything contained in sub-sect. (2) of sect. 2 of the Land Transfer Act, 1897, be made by the proving executor or executors without the authority of the Court and shall be as effectual as if all the persons named as executors had concurred therein." (Conveyancing Act, 1911, s. 12, sub-s. (i).) Conveyancing Act, 1911.

Where a testator appoints special executors as to pro- Special executors.

perty abroad, and other persons as general executors, the latter can make a good title to the English real estate without the concurrence of the special executors. (*Re Cohen's Executors and L. C. C.*, [1902] 1 Ch. 187.)

Powers of management and maintenance.—Trustees for infants have certain powers of managing the property and maintaining the infants out of income; it may be convenient that these should be referred to here.

The Conveyancing Act, 1881, in effect, imports certain clauses into wills where the beneficiaries are infants.

Sect. 42 gives powers of managing land held in trust for an infant. Sect. 43 gives powers to apply the income of any property held in trust for an infant for the maintenance and benefit of the infant. These sections are as follows, omitting the words in sect. 42 which were repealed by sect. 14 of the Conveyancing Act, 1911.

Conveyancing Act, 1881, s. 42.

Sect. 42.—"(1) If and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant, the trustees appointed for this purpose by the settlement, if any, or if there are none so appointed, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or of part thereof, or with power of consent to or approval of the exercise of such a power of sale, or if there are none, then any persons appointed as trustees for this purpose by the Court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land; and in every such case the subsequent provisions of this section shall apply.

"(2) The trustees shall manage or superintend the management of the land, with full power to fell timber or cut underwood from time to time in the usual course for sale, or for repairs or otherwise, and to erect, pull down, rebuild, and repair houses, and other buildings and erections, and to continue the working of mines, minerals, and quarries which have usually been worked, and to drain or otherwise improve the land or any part thereof, and to insure against loss by fire, and to make

allowances to and arrangements with tenants and others, and to determine tenancies, and to accept surrenders of leases and tenancies, and generally to deal with the land in a proper and due course of management; but so that, where the infant is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions, on and subject to which the infant could, if of full age, cut the same. Conveyancing Act, 1881, s. 42.

"(3) The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land.

"(4) The trustees may apply at discretion any income which, in the exercise of such discretion, they deem proper, according to the infant's age, for his or her maintenance, education, or benefit, or pay thereout any money to the infant's parent or guardian, to be applied for the same purposes.

"(5) The trustees shall lay out the residue of the income of the land in investment on securities on which they are by the settlement, if any, or by law, authorised to invest trust money, with power to vary investments; and shall accumulate the income of the investments so made in the way of compound interest, by from time to time similarly investing such income and the resulting income of investments; and shall stand possessed of the accumulated fund arising from income of the land and from investments of income on the trusts following (namely):

"(i) If the infant attains the age of twenty-one years, then in trust for the infant;

"(ii) If the infant is a woman and marries while an infant, then in trust for her separate use, independently

of her husband, and so that her receipt after she marries, and though still an infant, shall be a good discharge; but

"(iii) If the infant dies while an infant, and being a woman without having been married, then, where the infant was, under a settlement, tenant for life, or by purchase tenant in tail or tail male or tail female, on the trusts, if any, declared of the accumulated fund by that settlement; but where no such trusts are declared, or the infant has taken the land from which the accumulated fund is derived by descent, and not by purchase, or the infant is tenant for an estate in fee simple, absolute or determinable, then in trust for the infant's personal representatives, as part of the infant's personal estate;

but the accumulations, or any part thereof, may at any time be applied as if the same were income arising in the then current year.

"(6) Where the infant's estate or interest is in an undivided share of land, the powers of this section relative to the land may be exercised jointly with persons entitled to possession of, or having power to act in relation to, the other undivided share or shares.

"(7) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

"(8) This section applies only where that instrument comes into operation after the commencement of this Act."

It has been held that trustees appointed for the purposes of the Settled Land Acts are not trustees with a power of sale within sect. 42. (*Re Helyar*, [1902] 1 Ch. 391.)

Conveyancing Act, 1881, s. 43.

Sect. 43.—"(1) Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the

trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not.

"(2) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorised to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year.

"(3) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

"(4) This section applies whether that instrument comes into operation before or after the commencement of this Act."

It should be observed that the section will not apply (a) if the interest is less than a life interest; (b) if the interest does not vest on or before the infant attains twenty-one; or (c) where the gift does not carry the income prior to vesting.

The mere fact that there is another maintenance clause in the will is not of itself sufficient to show a contrary intention. (*Re Cooper*, [1913] 1 Ch. 350.)

On these sections and the cases decided upon them, see Wolstenholme's Conveyancing and Settled Land Acts.

Where a residue is given to an infant, as soon as the

Residue given to an infant.

executor has paid the debts, funeral and testamentary expenses and legacies the executor will become a trustee of the clear residue for the infant within the meaning of sect. 43. (*Re Smith*, 42 Ch. D. 302; *Re Adams*, (1906) W. N. 220.)

Executor's Title to Residue.

By virtue of the Executors Act, 1830, the executors hold any undisposed-of personalty in trust for the next of kin (*post*, p. 124); but this Act does not apply where there are no statutory next of kin, consequently there is the following rule:—

Executors entitled to residue against the Crown.

RULE. In the absence of next of kin and of a contrary intention, executors are entitled to the undisposed-of residue of the personal estate. (See *Mapp* v. *Elcock*, 2 Phill. 796; *Ellcock* v. *Mapp*, 3 H. L. C. 492; *Att.-Gen.* v. *Jefferys*, [1908] A. C. 411.)

"The executor claims the property as incident to the office, and as vested in him by virtue of it, in the absence of any intention to the contrary expressed by the testator." (*Per* Lord Cottenham, C., in *Mapp* v. *Elcock*, 2 Phill. at p. 796.)

Presumption from equal legacies to executors.

If, however, a legacy is given to a sole executor, or equal legacies to each of several executors, a presumption is raised that he or they are not intended to take the residue. (*Farrington* v. *Knightly*, 1 P. Wms. 544.) This presumption may be rebutted by parol evidence. (*Langham* v. *Sanford*, 17 Ves. at p. 443.) The presumption does not arise where there are unequal gifts of personalty to the executors. (*Att.-Gen.* v. *Jefferys*, [1908] A. C. 411.)

The rule in *Ellcock* v. *Mapp*.

There is a rule of construction that if the residuary personal estate is given to trustees, and the trustees are also executors, they cannot as executors claim any part of the residue beneficially. (*Ellcock* v. *Mapp*, 3 H. L. C.

492; see Hawkins on Wills, Chapter XXI.) Parol evidence cannot be given against this rule of construction.

Further, if a legacy is given to an executor for his care and trouble, this shows that no executor is intended to take the residue beneficially, and parol evidence is not admissible to rebut this rule of construction. (*White* v. *Evans*, 4 Ves. 21.)

On the admission of parol evidence in favour of the executor see *Re Bacon's Will*, 31 Ch. D. 460.

CHAPTER X.

DEBTS—ADMINISTRATION.

Funeral and Administration Expenses.

Funeral and administration expenses.

Rule. The expenses of the funeral of the deceased and the costs of administering the estate are a first charge upon the assets. (*Sharp* v. *Lush*, 10 Ch. D. 468 ; *Loomes* v. *Stotherd*, 1 Si. & St. 458.)

Funeral expenses.

Funeral expenses.—If the estate is insolvent, the rule, apart from special circumstances, is that no more shall be allowed for the funeral than is necessary. (*Stag* v. *Punter*, 3 Atk. 119.)

"The rule, as against a creditor, is, that no more shall be allowed for a funeral than is necessary. In considering what is necessary, regard must undoubtedly be had to the degree and condition in life of the party." (*Per* Bayley, J., in *Hancock* v. *Podmore*, 1 B. & Ad. at p. 264.)

Tombstone.

Funeral expenses do not include the cost of mourning for the family, or of a tombstone. (Ingpen on Executors, p. 308.)

Administration expenses.

Administration expenses.—"Testamentary expenses" and "executorship expenses" are the expenses incident to the proper performance of the duty of the executor; they include the expenses incurred in relation to the administration of the estate, "whether incurred in an administration suit, or whether incurred simply by

taking the advice of a solicitor and counsel outside the administration suit as to the distribution of the estate." (*Per* Jessel, M. R., in *Sharp* v. *Lush*, 10 Ch. D. pp. 470, 471.)

As to death duties, see Chap. XI. Where the estate is insolvent no death duties will be payable, but apparently increment value duty may be. Death duties.

Debts.

When the estate of the deceased is insufficient to discharge all the debts and liabilities, it becomes necessary to determine the priorities of the different debts *inter se*. This investigation involves the difficult distinction between legal and equitable assets. It is remarkable that the priority depends upon whether or not the estate is being administered by the Court. Secured creditors have rights under their securities which must be taken into account in considering the effect of the following rules. Insolvent estate.

Administration by the Court.

RULE. Where the insolvent estate of a dead person is being administered by the Court, the same rules apply as if it were administered in bankruptcy. (Judicature Act, 1875, s. 10.) Judicature Act, 1875, s. 10.

"In the administration by the Court of the assets of any person . . . whose estate may prove to be insufficient for the payment in full of his debts and liabilities . . . the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt." (Supreme Court of Judicature Act, 1875, s. 10.) Court administers an insolvent estate as if in bankruptcy.

Effect of section 10.

The section "does not augment or enlarge the assets to be administered." (*Per* Cozens-Hardy, J., in *Re Whitaker*, [1900] 2 Ch. at p. 678.) "It is settled that the rules in bankruptcy which increase a bankrupt's assets —*e.g.*, the reputed ownership clause, the fraudulent preference clause, and the sections which defeat certain settlements and executions—do not apply to the administration in Chancery of the assets of a deceased person." (*Per* Lindley, L. J., in *Re Leng*, [1895] 1 Ch. at p. 655.)

Retainer.

"Two further rules have been settled, namely: First, that the common law right of an executor or administrator to retain a debt due to himself is not affected by sect. 10 of the Judicature Act, 1875" (see *post*, p. 87, as to retainer); . . . "secondly, that this section has not deprived judgment creditors of their right to be paid in priority to other creditors in an administration action, although they have no priority in bankruptcy." (*Ib.* p. 656.)

Judgment creditors.

The judgment creditors are paid *pari passu*. (*M'Causland* v. *O'Callaghan*, [1904] 1 Ir. 376.)

What debts are provable.

Debts provable in bankruptcy.—Sect. 37 of the Bankruptcy Act, 1883, states the debts and liabilities provable as follows:—

(1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust shall not be provable in bankruptcy.

(2) A person having notice of any act of bankruptcy available against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice.

(3) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge, by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy.

Secured creditors.—The provisions as to proof by

secured creditors contained in the Second Schedule to the Bankruptcy Act, 1883, are as follows:— Secured creditors.

If a secured creditor realises his security, he may prove for the balance due to him, after deducting the net amount realised.

If a secured creditor does not either realise or surrender his security, he shall, before ranking for dividend, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.

Order of debts.—"In bankruptcy . . . the rule as to debts and liabilities provable is that all those debts and liabilities, whether contracted for value or not, shall rank *pari passu*." (*Per* Rigby, L. J., in *Re Whitaker*, [1901] 1 Ch. at p. 12.) General rule. All debts rank equally.

Exceptions.—Certain debts and claims have a preference in bankruptcy. These are certain rates, taxes and wages specified in sect. 1 of the Preferential Payments in Bankruptcy Act, 1888 (see *Re Heywood*, [1897] 2 Ch. 593); compensation (not exceeding 100*l.*) under sect. 5 (3) of the Workmen's Compensation Act, 1906; and claims for contributions by employers under sect. 110 of the National Insurance Act, 1911. Exceptions: Preferential debts;

Under sect. 3 of the Married Women's Property Act, 1882, the claim of the widow for money lent to the deceased for the purposes of his trade or business is postponed to those of other creditors (*Re Leng*, [1895] 1 Ch. 652); but where in such case the widow is executrix her right of retainer is not taken away. (*Re Ambler*, [1905] 1 Ch. 697.) Money lent by widow;

Whether the Crown still has a priority is doubtful. (*Re Oriental Bank Corporation*, 28 Ch. D. 643.) Crown debt;

Where a married woman is adjudged bankrupt, the claim of her husband for money lent by him to her for the purposes of her trade or business is postponed to the Money lent by husband.

claims of all other creditors for valuable consideration. (Bankruptcy and Deeds of Arrangement Act, 1913, s. 12.)

Administration in Bankruptcy.

Insolvent estate may be administered in bankruptcy.

Under the combined effect of sect. 125 of the Bankruptcy Act, 1883, sect. 21 (2) of the Bankruptcy Act, 1890, and sect. 21 (3) of the Bankruptcy and Deeds of Arrangement Act, 1913, a creditor or the personal representative of the deceased may present a petition in bankruptcy against the estate of the deceased, and where the Court is satisfied that the estate is not sufficient to discharge the liabilities may transfer administration proceedings to a Bankruptcy Court.

Effect of administration in bankruptcy.

"There are . . . not many distinctions between administration under sect. 125 of the Bankruptcy Act and administration in the Chancery Division, but there are some in addition to the creditor's power of instituting proceedings to which I have already referred. For example, there is the priority given to testamentary expenses by sect. 125, sub-sect. (7), and there is the right of disclaimer which cannot be exercised in a Chancery administration." (*Per* Phillimore, J., in *Re Kitson*, [1911] 2 K. B. at p. 113.)

"There can be no doubt since the decision in *Hasluck* v. *Clark* that 'the estate of the deceased debtor,' for the purposes of sect. 125 of the Bankruptcy Act, 1883, is the property which belonged to that debtor subject to all subsisting charges and rights which attached to it." (*Per* Farwell, L. J., in *Johnson* v. *Pickering*, [1908] 1 K. B. at p. 10.)

Right of retainer.

Thus, an order under sect. 125 does not deprive an executor of his right of retainer over legal assets which he has got in (*Re Rhoades*, [1899] 2 Q. B. 347); nor does

Execution creditor.

it deprive an execution creditor of his rights. (*Hasluck* v. *Clark*, [1899] 1 Q. B. 699.)

Administration out of Court.

Where, however, the estate is being administered out of Court, the order in which debts are to be paid depends upon the distinction between legal and equitable assets (as to this, see below). The rule seems to be as follows:— Administration of an insolvent estate out of Court.

RULE. Where the estate of a deceased person is being administered out of Court, then—

(a) as against legal assets, the different classes of debts rank according to the priority given by law;

(b) as against equitable assets, the different classes of debts rank *pari passu* subject to the creditors bringing into account what they receive from legal assets (*Chapman* v. *Esgar*, 1 Sm. & G. 575), and to the right of the Crown to be paid in priority. (*Re Henley & Co.*, 2 Ch. D. 469.)

Priority of debts.—The following statement of the order of priority of debts against legal assets is based upon the recognised text-books, which treat the subject at large. The reader should consult these for details in exceptional cases. For most practical purposes it is believed that the short account given here will be found sufficient, but it must be remembered that on some points the law is not conclusively settled; in particular there is a difference of opinion as to the order of (4) and (5) below. Order of priority of debts against legal assets.

The order is as follows:—

(1) Debts due to the Crown by record or specialty.

(2) Debts given priority by statute, *e.g.*, sums due from a deceased overseer of the poor (Poor Relief Act, 1743, s. 3); sums due from a collector to Metropolis Paving Commissioners (57 Geo. III. c. 29, s. 51, local); certain debts due from officers of savings banks (Trustee Savings Bank Act, 1863, s. 40; Savings Bank Act, 1891,

s. 13); certain regimental debts (the Regimental Debts Act, 1893); sums due from an officer of a registered friendly society (Friendly Societies Act, 1896).

(3) Judgment debts recovered against the deceased in a Court of record *pari passu*.

(4) Recognizances and statutes.

(5) Judgments recovered against the personal representative according to priority of date. (*Re Williams' Estate*, L. R. 15 Eq. 270.)

(6) Crown debts not by record or specialty. (See *Re West London Commercial Bank*, 38 Ch. D. 364.)

(7) Specialty and simple contract debts other than voluntary bonds and covenants. (See *Re Samson*, [1906] 2 Ch. 584, on the effect of Hinde Palmer's Act, which abolished the distinction between these kinds of debts.)

(8) Loans under the Partnership Act, 1890, s. 3; and by the widow under the Married Women's Property Act, 1882, s. 3.

(9) Voluntary bonds and covenants.

Apparently claims for dilapidations under the Ecclesiastical Dilapidations Act, 1871, rank with simple contract debts. (*Re Monk*, 35 Ch. D. 583.)

In reference to this order of priority the following points may be noticed:—

Crown debt. A Crown debt does not lose its priority by becoming vested in a subject. (*Re Churchill*, 39 Ch. D. 174.)

Judgment debt. Apparently it is no longer necessary that a judgment debt should be registered in order to have priority. (Land Charges Act, 1900.)

A judgment debt recovered in a foreign country is considered as a simple contract debt. (*Re Boyse*, 15 Ch. D. 591.)

Solicitor's lien for costs. A solicitor's lien for costs on a specific fund recovered by him is a first charge on the fund. (*Lloyd* v. *Mason*, 4 Hare, 132.)

Contingent liabilities. The personal representatives can pay the immediate debts without regard to future and contingent liabilities. (*Re Hargreaves*, 44 Ch. D. 236.)

Dower.—The widow's right to dower or freebench, if not barred (see *post*, Chapter XVI.), has priority over the rights of mere creditors. (*Spyer* v. *Hyatt*, 20 Beav. 621; *Northern Bank* v. *McMackin*, [1909] 1 Ir. 374.) Dower has priority over unsecured debts.

"Mere debts, to which the lands of a deceased husband are not subject or liable, are not within the 5th section of the [Dower] Act, and are not by that section made valid or effectual as against his widow's right to dower." (*Per* Page-Wood, V.-C., in *Jones* v. *Jones*, 4 K. & J. at p. 366.)

Preference and retainer.—As amongst creditors of equal degree the executor or administrator could pay one creditor in preference to another out of legal assets, and could in like manner retain a debt due to himself out of legal assets in preference to other creditors of equal degree. The modern form of administration bond precludes an administrator from preferring himself ((1899) W. N. 262), but apparently he can still prefer any other creditor to another of equal degree. (*Re Belham*, [1901] 2 Ch. 52.) Out of legal assets executor may prefer, but administrator cannot prefer himself.

Retainer.—"What is retainer? It is this, that an executor having a claim against the testator's estate is not to be put in a worse position than any other creditor, who, by suing and obtaining a judgment against the executor, could obtain priority, while the executor, not being able to sue himself, could not obtain priority. The right of retainer applies to that which the executor has in his hands, or which has been paid into Court while he was executor, and which but for that payment would have come into his hands." (*Per* Cotton, L. J., in *Re Compton*, 30 Ch. D. at p. 19; see also Lindley, M. R.'s judgment in *Re Rhoades*, [1899] 2 Q. B. 347.) Retainer.

The right does not extend to personal representatives of the executor, not being representatives of the original testator, nor to a claim for damages that are in their nature arbitrary as damages founded upon torts. (*Ib.*)

A person to whom administration is granted as an

Officer of bank.

officer of a bank, who are creditors, cannot retain in respect of the bank's debt. (*Re Richards*, [1901] 2 Ch. 399.) It would seem to follow that where a corporation is appointed executor, and administration is granted to a syndic for the use of the corporation, that the syndic cannot retain in respect of a debt of the corporation.

Statute-barred debt.

An executor may exercise his right of retainer in respect of a statute-barred debt. (*Trevor* v. *Hutchins*, [1896] 1 Ch. 844.)

No retainer out of equitable assets.

As against equitable assets, the executor has no right of retainer. (*Bain* v. *Sadler*, L. R. 12 Eq. 570.)

Executor surety for testator.

Before an executor pays a debt of his testator for which he is surety, there is no debt in existence in respect of which he can exercise his right of retainer. (*Re Beavan*, [1913] 2 Ch. 595.)

Executor trustee for the beneficiaries.

An executor is not bound to exercise his right of retainer for the benefit of beneficiaries claiming through him. (*Re Benett*, [1906] 1 Ch. 216.)

Administration of Estates Act, 1869.

Hinde Palmer's Act.—"The power of paying in any order debts of equal degree is untouched by Hinde Palmer's Act, but it now extends to all the debts of the estate." (*Per* Fletcher Moulton, L. J., in *Re Samson*, [1906] 2 Ch. 592.)

But, although Hinde Palmer's Act has abolished the distinction between specialty and simple contract debts, it has been held that an executor cannot retain in respect of a simple contract debt against a specialty creditor. (*Re Jennes*, 53 Sol. J. 376. *Sed qu.* see *Olpherts* v. *Coryton*, [1913] 1 Ir. 211.)

Legal and Equitable Assets.

The distinction between legal and equitable assets.

The distinction between legal and equitable assets is a difficult one. At the present day its chief importance arises in connection with the executor's right of retainer. It does not depend upon whether the executor would have to go to a Court of law or a Court of Equity to recover the particular asset. "The true principle is that what-

ever the executor will be charged with as assets in an action at law against him by a creditor, whether it be recoverable by the executor as against a third person in a Court of law or only in a Court of Equity, provided he so recover it merely *virtute officii* as executor, is legal assets." (Jarman on Wills, p. 2022.) Legal and equitable assets.

"Much difficulty has sometimes arisen in determining the precise distinction between legal and equitable assets. The general proposition is clear enough, that when assets may be made available in a Court of law, they are legal assets; and when they can only be made available through a Court of Equity, they are equitable assets. This proposition does not, however, refer to the question whether the assets can be recovered by the executor in a Court of law or in a Court of Equity. The distinction refers to the remedies of the creditor, and not to the nature of the property. The question is not whether the testator's interest was legal or equitable, but whether a creditor of the testator, seeking to get paid out of such assets, can obtain payment thereout from a Court of law, or can only obtain it through a Court of Equity. This, I apprehend, is the true distinction. If a creditor brings an action at law against the executor, and the executor pleads *plene administravit*, the truth of the plea must be tried by ascertaining what assets the executor has received, and whatever assets the Court of law, in trying that question, would charge the executor with, must be regarded as legal assets; all others would be equitable assets." (*Per* Kindersley, V.-C., in *Cook* v. *Gregson*, 3 Drew. at p. 549.)

"Equitable assets are property which is applicable for the payment of the dead person's debts but which is not vested in his personal representative, his executor or administrator, *virtute officii*." (Maitland, Equity, p. 199.)

Since at the present day all the property of the dead person (except copyholds of which he was tenant on the rolls) vests in the personal representatives, it might be supposed that all assets (except legal interests in copyholds) are now legal. But the general opinion of text

writers is opposed to this view. And it has been held that the Land Transfer Act, 1897, does not make the deceased's real estate legal assets so as to give the executor a right of retainer in respect of it. (*Re Williams*, [1904] 1 Ch. 52.)

Realty devised to pay debts.

Really devised to pay debts.—The earliest kind of equitable assets was realty devised to pay or charged with the payment of debts.

Equity of redemption.

Equity of redemption.—Under the Administration of Estates Act, 1833, an equity of redemption in freehold or copyhold land is made assets liable to specialty and simple contract debts in a Court of Equity, but this does not make it legal assets so as to give the executor a right of retainer. (*Walters* v. *Walters*, 18 Ch. D. 182.)

This Act, which made the deceased's real estate assets for the payment of his debts, does not create a charge on such estate until judgment has been obtained. (*Re Moon*, [1907] 2 Ch. 304.)

Separate estate.

Separate estate.—Prior to the Married Women's Property Acts the separate property of a married woman was equitable assets. In *Re Poole's Estate* (6 Ch. D. 739), where the testatrix had separate property by virtue of the Married Women's Property Act, 1870, Hall, V.-C., said: "The separate property of the wife under the Act is equitable assets distributable . . . *pari passu* amongst her creditors" (p. 743). It would therefore seem to be the case that all separate property of a married woman is equitable assets.

Is property appointed under a general power, legal or equitable assets?

Property appointed under a general power.—There is a conflict of judicial opinion on the question whether personal property appointed by the testator's will in exercise of a general power is equitable or legal assets.

"In *In re Hoskin's Trusts* [6 Ch. D. 281] it was treated by the Court of Appeal as established beyond all question that where a *feme covert*, or any other person

having a general power of appointment over a fund of personalty, makes an appointment of the fund by will and appoints an executor, the executor when he has proved the will is entitled to receive the appointed fund. Nor is it now open to dispute that the executor is bound to apply the fund as assets—equitable assets—in the payment of debts." (*Per* Swinfen Eady, J., in *Re Fearnsides*, [1903] 1 Ch. at p. 256.) Views of: Eady, J.

"It has long been settled that property appointed by will under a general power of appointment is subject to the payment of the appointor's debts: *Beyfus* v. *Lawley* ([1903] A. C. 411); and if such property is personal property, it is equitable assets of the testator." (*Per* Lord Lindley in *Commissioners of Stamp Duties* v. *Stephen*, [1904] A. C. at p. 140.) Lord Lindley.

"Property appointed in exercise of a general power clearly did not pass to the executor by virtue of his office or by virtue simply of the grant of probate. It was therefore an equitable asset for the payment of debts." (*Per* Parker, J., in *Re Hadley*, [1909] 1 Ch. at p. 22.) Parker, J.

"I am aware that Lord Lindley in *Commissioners of Stamp Duties* v. *Stephen* calls the appointed fund equitable assets of the testator . . . but I do not think he was there drawing any distinction between legal assets and equitable assets, and certainly the authorities to which he refers as establishing the rule do not proceed upon any such distinction. The result is that in my opinion the appointed fund became legal assets. . . ." (*Per* Cozens-Hardy, M. R., in *Re Hadley*, [1909] 1 Ch. at p. 31; see also *per* Farwell, L. J., at p. 36.) Cozens-Hardy, M. R.

Order of Application of Assets in Payment of Debts.

Where the deceased's estate is sufficient to discharge the debts and liabilities, the order in which the assets are to be applied in payment of the debts, though a matter of indifference to the creditors, is of importance to the beneficiaries. The testator can direct in what order the assets should be so applied, but in default of any direc- Application of assets in payment of debt when estate is solvent.

tion, the assets are not applied *pari passu*, but in an order determined by the established rules of administration.

General personal estate primarily liable for debts.

RULE. Subject to any direction to the contrary, the deceased's general personal estate, not specifically bequeathed, is primarily liable to the payment of the funeral and testamentary expenses and debts (*Greene* v. *Greene*, 4 Mad. 148) other than mortgage debts. (Locke King's Acts, below, p. 94.)

"The personal estate is primarily liable for the payment of debts and funeral and testamentary expenses." (*Per* Buckley, J., in *Re Banks*, [1905] 1 Ch. at p. 549.)

Property appointed under general power.

For the purpose of the rule the general personal estate includes property over which the testator had a general power of appointment, and which passes under the residuary gift in the will (*Re Hartley*, [1900] 1 Ch. 152); but it does not include property in a residuary gift which is subject to a secret trust. (*Re Maddock*, [1902] 2 Ch. 220; see Chap. XIV., below.)

Estate duty.

"Testamentary expenses" do not include the estate duty on realty, but do include the estate duty on a fund appointed by the testator in exercise of a general power. (*Re Hadley*, [1909] 1 Ch. 20.)

Costs of administration of real estate.

Exception.—In accordance with the rule in *Patching* v. *Barnett* (51 L. J. Ch. 74; [1907] 2 Ch. 154, n.) costs occasioned by the administration of the real estate are borne by it, notwithstanding the Land Transfer Act, 1897. (*Re Jones*, [1902] 1 Ch. 92; *Re Betts*, [1907] 2 Ch. 149.)

What will exonerate personal estate?

Exoneration of personal estate.—A charge of debts on the real estate is not by itself sufficient to exonerate the personal estate from its primary liability. (*Tait* v. *Lord Northwick*, 4 Ves. 816, 824; *Re Banks*, [1905] 1 Ch. 547.)

The rules of construction in relation to the exoneration

of the personal estate named after the cases of *Bootle* v. *Blundell* (1 Mer. 193); *Roberts* v. *Walker* (1 R. & My. 752); *Kidney* v. *Coussmaker* (1 Ves. jun. 426); and *Greville* v. *Browne* (7 H. L. C. 689), are set out in Chapter XX. of Hawkins on Wills. In *Re Smith* ([1913] 2 Ch. 216), there was realty and personalty in a foreign country.

Order of application of assets after residuary personalty is exhausted.

Order of application of assets.—Where the residuary personalty is insufficient the order in which the property is to be applied in the payment of his debts is thus stated by the late Professor Maitland (Equity, p. 208):—

"1. Personalty not specifically bequeathed, retaining a fund sufficient to meet any pecuniary legacies.

"2. Realty specifically appropriated for, or devised in trust for (and not merely charged with) payment of debts.

"3. Realty that descends to the heir.

"4. Realty charged with the payment of debts.

"5. Fund (if any) retained to pay general pecuniary legacies.

"6. Realty devised, whether specifically or by general description, and personalty specifically bequeathed *pro rata* and *pari passu*.

"7. Property which did not belong to the dead man, but which is appointed by his will in exercise of any general power of appointment."

It would seem more correct to add to 4 "and personalty specifically bequeathed subject to a charge of debts."

Specific legacy subject to a charge.

Property subject to a charge.—Where personal property which is specifically bequeathed is subject to a charge at the testator's death (for example, if he bequeaths his gold watch which is in pawn), the specific legatee is entitled to have the charge discharged (*Knight* v. *Davis*, 3 Myl. & K. 358) if, subject to the above rules, the testator's assets permit of it.

Real property subject to a mortgage.

This also was formerly the rule as regards real and leasehold property which was subject to a mortgage or charge; but by the Acts known as Locke King's Acts this rule is now altered and replaced by the following:—

Locke King's Acts.

RULE. If any of the real or leasehold property of the deceased is at his death charged with the payment of any sum of money, then in the absence of a contrary intention the property charged is primarily liable to the payment of the money charged on it; neither a general direction to pay debts, nor a charge of debts upon the residuary real estate is a sufficient indication of a contrary intention. (The Real Estate Charges Acts, 1854, 1867 and 1877.)

The relevant sections of these Acts are as follows:—

Real Estate Charges Act, 1854.

"When any person shall, after the 31st of December 1854, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof according to its value bearing a proportionate part of the mortgage debts charged on the whole thereof." (The Real Estate Charges Act, 1854, s. 1.)

Real Estate Charges Act, 1867.

"In the construction of the will of any person who may die after the 31st day of December 1867, a general direc-

tion that the debts or that all the debts of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said Act, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate." (The Real Estate Charges Act, 1867, s. 1.)

"In the construction of the said Act and this Act the word 'mortgage' shall be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a testator." (*Ib.* s. 2.)

Real Estate Charges Act, 1877.

"The Acts mentioned in the schedule hereto" [*i.e.*, the two previous Real Estate Charges Acts] "shall, as to any testator or intestate dying after the 31st December 1877, be held to extend to a testator or intestate dying seised or possessed of or entitled to any land or other hereditaments of whatever tenure which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase-money; and the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate unless (in the case of a testator) he shall within the meaning of the said Acts have signified a contrary intention; and such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate or residuary real estate." (Real Estate Charges Act, 1877, s. 1.)

Charge for estate duty.

The Acts extend to a charge created by an elegit (*Re Anthony*, [1892] 1 Ch. 450); and to a charge for estate duty created by sect. 2 (1) of the Finance Act, 1894. (*Re Bowerman*, [1908] 2 Ch. 340.)

"It would require a good deal of argument to convince me that the application of this statute, the Real Estate Charges Act, 1877, is confined to mortgages and such other charges as are merely equitable and not created by

statute." (*Per* Joyce, J., in *Re Bowerman*, [1908] 2 Ch. at p. 343.)

Contrary intention need not be in the will.

In *Re Cockcroft* (24 Ch. D. 94), Kay, J., makes some interesting observations on the Acts. The Act of 1877 extends to leaseholds. (*Re Kershaw*, 37 Ch. D. 674.)

Notice that under the Act of 1854 the contrary intention need not be found in the will, but may be signified by "deed or other document."

CHAPTER XI.

DEATH DUTIES—LIABILITIES.

The subject of death duties is outside of the scope of this book, but it may be convenient to state the general principles which regulate their incidence. In all cases of difficulty the recognised text-books on the subject should be consulted.

Estate Duty.

Estate duty on property of which the deceased could not dispose.

Rule. Estate duty payable in respect of property passing on the death of the deceased which he was *not* competent to dispose of at his death, is borne by the beneficiaries in proportion to their beneficial interests. (*Re Countess of Orford*, [1896] 1 Ch. 257.)

Estate duty for which executor is not accountable borne by beneficiaries in proportion to their interests.

"The decision of North J. in *In re Countess of Orford* seems to me to be a distinct authority on the construction of the Finance Act, 1894, that in all cases where the duty becomes payable, for which the executor is not made accountable by sect. 6, sub-sect. (2), the duty must be paid ultimately by the persons beneficially entitled in proportion to their shares, and it follows that the duty cannot be thrown wholly on the residue." (*Per* Vaughan Williams, L. J., in *Berry* v. *Gaukroger*, [1903] 2 Ch. at p. 131.)

Finance Act, 1894, s. 6 (2).

The words in the sub-section referred to by the Lord Justice are: "The executor of the deceased shall pay the estate duty in respect of all personal property (whereso-

ever situate) of which the deceased was competent to dispose at his death."

Although real estate now vests in the executor as such (*supra*, Chap. IX., p. 69), it did not at the time of the passing of the Finance Act, 1894. The following rule as to incidence is not altered by the Land Transfer Act, 1897. (See sect. 2 (3).)

Estate duty a charge upon real estate.

RULE. Estate duty in respect of the real estate of the deceased is a first charge upon such real estate. (Finance Act, 1894, s. 9.)

Finance Act, 1894, s. 9.

"A rateable part of the estate duty on an estate in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which the duty is leviable." (Finance Act, 1894, s. 9 (1).)

Finance Act, 1894, s. 14.

Under sect. 14 (1) of the Finance Act, 1894, "In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person who, being authorised or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property, (whether as capital or as an annuity or otherwise), under a disposition not containing any express provision to the contrary."

Estate duty upon personal property is a testamentary expense.

RULE. Estate duty upon personal property which the deceased was competent to dispose of at his death (otherwise than by appointment) and also the estate duty in respect of personal property appointed by the will of the deceased in exercise of a general power is payable out of the deceased's personal estate as a testamentary expense. (*Re Hadley*, [1909] 1 Ch. 20; *Re Pullen*, [1910] 1 Ch. 564; *Porte* v. *Williams*, [1911] 1 Ch. 188.)

This principle includes the case of a reversionary interest forming part of the deceased's estate which passes under his will. (*Re Avery*, [1913] 1 Ch. 208.)

A *donatio mortis causâ* does not pass to the executor as such, and estate duty in respect of it is not a testamentary expense. (*Re Hudson*, [1911] 1 Ch. 206.) *Donatio mortis causâ.*

Settlement Estate Duty.

RULE. The settlement estate duty leviable in respect of a legacy or other personal property settled by the will of the deceased shall (unless the will contains an express provision to the contrary) be payable out of the settled legacy or property in exoneration of the rest of the deceased's estate. (Finance Act, 1896, s. 19 (1).) Finance Act, 1896, s. 19.

Settlement estate duty on real property is a charge on the land.

Succession and Legacy Duties.

RULE. Subject to any direction to the contrary, succession duty and legacy duty are borne by the beneficiaries, in respect of their interests, at the appropriate rate. (Succession Duty Act, 1853, s. 42; Legacy Duty Act, 1796, s. 6.) Succession and legacy duties borne by beneficiaries.

Both these duties are not payable at the same time. The rate of duty depends on the relationship of the testator or predecessor to the legatee or successor. The tax in each case is on the beneficial interest, but there is a special provision for valuing annuities, &c.

If a legacy is given free of duty, this is really a gift of an additional legacy equal in amount to the duty, but further duty is not payable upon it. (Legacy Duty Act, 1796, s. 21.) Legacy free of duty.

Increment Value Duty.

Increment value duty a charge on land.

RULE. When increment value duty becomes payable by reason of a death it is a charge on the land or interest in land in respect of which it is payable. (Finance (1909-10) Act, 1910, s. 5.)

Finance (1909-10) Act, 1910.

"The provisions as to the assessment, collection, and recovery of estate duty under the Finance Act, 1894, shall apply as if increment value duty to be collected on the occasion of the death of any person were estate duty; but where any interest in land in respect of which increment value duty is payable is property passing to the personal representative as such, the duty shall be payable out of that interest in land in exoneration of the rest of the deceased's estate. . . ." (Finance (1909-10) Act, 1910, s. 5.)

LIABILITIES.

Some kinds of property are subject to liabilities which are incident to the property, but are not debts owing by the deceased.

Legatee takes property subject to liabilities incident to it.

RULE. A devisee or legatee takes the property devised or bequeathed subject to liabilities incident to the property, and not resulting in a debt due from the testator in his lifetime. (*Bothamley* v. *Sherson*, L. R. 20 Eq. 304.)

[In *Stewart* v. *Denton*, 4 Doug. 219] "All the judges held that where there is a charge on the legacy which the testator would or might have been liable to pay, that is to say, a charge created by the testator as distinguished from a charge incident to the chattel, such as rent payable under a leasehold estate, or (as has since been decided) calls upon railway shares, such a charge is payable out of the testator's estate. In fact the distinction seems to turn on this, is the charge one created by the testator for what has been called a temporary purpose, that is, with

the view of raising money or of making use of the property (as in the case of the wines, for the purpose of the testator making use of the wines and getting them to this country), or is it from its nature a charge incident to the property, as in the case of rent on leaseholds or calls payable on railway shares ? In the first place, the specific legatee is entitled to have the legacy redeemed or freed from the charge. In the second case, he is not so entitled, because the testator is supposed to give the thing as it is, and the charge upon it is really not in strictness an incumbrance, but something incident to the nature of the thing." (*Per* Jessel, M. R., in *Bothamley* v. *Sherson,* L. R. 20 Eq. at p. 315.)

Calls on shares.

Shares.—If a call on shares not fully paid up is actually made before the testator's death, the instalment payable under such call is payable out of the testator's general personal estate. (*Armstrong* v. *Burnet,* 20 Beav. 424; *Addams* v. *Ferick,* 26 Beav. 384.)

Liabilities under leases.

Leaseholds.—Arrears of head rents due at the testator's death are payable out of the testator's general personal estate, future rent by the legatee of the leaseholds. (*Barry* v. *Harding,* 1 Jo. & Lat. 475.) Where the leaseholds are dilapidated at the testator's death the liability to damages for the dilapidations falls on the legatee.

" The question is whether the liability of the testator's estate to pay the future rent, and its liability to damages for the dilapidations, are debts within the meaning of that clause as between the residuary and the specific legatees. I am of opinion that they are not. These are not debts, but liabilities. Under the covenant to keep the house in repair the testator's estate is liable to pay damages, the measure of which would be the damage done to the reversion by allowing it to be out of repair. This liability is not a debt. . . . A specific legatee takes a property *cum onere.* No one would imagine that if a leasehold held for ninety-nine years was specifically bequeathed, the testator's estate is to pay the rent for the remainder of the

term, so that the legatee would get it rent free." (*Per* Jessel, M. R., in *Hawkins* v. *Hawkins,* 13 Ch. D. at p. 473.)

But as between a tenant for life and remainderman of leaseholds the tenant for life is not liable to repair. (*Re Parry and Hopkin,* [1900] 1 Ch. 160.)

Fines on admission to copyholds.

Copyholds.—A devisee of copyholds or customary freeholds is liable to pay the fines, fees, &c. on admission, and these will include such fines, fees, &c. as would have been payable had the land been surrendered to the uses of the testator's will. (Wills Act, 1837, s. 4.)

Incidents of tenure.

Land.—A devisee of land takes subject to all quit rents, incidents of tenure, and other liabilities incident to the estate.

As to the liability of a terre-tenant to be sued for non-payment of a rent-charge issuing out of the land, see the cases referred to in *Re Herbage Rents,* [1896] 2 Ch. 811.

Obligation of landlord.

Land subject to lease.—If land specifically devised is subject to an obligation incident to the relation of landlord and tenant, the specific devisee bears the burden, but a covenant to expend money when called upon by the lessee is not incident to the relation, and the testator's estate bears the burden. (*Eccles* v. *Mills,* [1898] A. C. 360; *Re Hughes,* [1913] 2 Ch. 491.)

CHAPTER XII.

LEGACIES.

Specific legacies do not become the actual property of the legatees until the executor has assented, but the assent relates back to the death, consequently we have:—

Specific bequest carries income from death.

Rule. A specific bequest which is vested carries the income arising from the subject of the bequest as from the testator's death. (*Barrington* v. *Tristram*, 6 Ves. 345.)

Apportionment of income.

Dividends, rents, &c. are apportionable under the Apportionment Act, 1870, unless the testator excludes the operation of the Act. (*Re Lysaght*, [1898] 1 Ch. 115.)

Upkeep of specific legacy.

Conversely a specific legatee has to bear the cost of the upkeep of the subject of the bequest as from the testator's death until the assent.

"Now it seems to be settled law that when an executor gives his assent to a specific legacy the assent relates back to the death of the testator, and the specific legatee is entitled to the profits accrued due from the time of the testator's death. That being so, it seems to me to be right and fair that the specific legatee should be charged with the costs of the upkeep, care, and preservation of the specific legacy from the time of the death until the executor's assent." (*Per* Eve, J., in *Re Pearce*, [1909] 1 Ch. at p. 821, where *Sharp* v. *Lush*, 10 Ch. D. 468, which is *contra*, was not cited.)

The general rule is that interest on pecuniary legacies runs from the time when they are payable; the executor

has a year to administer the estate, consequently we have:—

Interest on general legacies.

RULE. A general legacy out of personal estate, if no time for its payment is fixed by the will, is payable at the expiration of one year from the testator's death, and carries interest from that date. (Jarman on Wills, p. 1107; *Benson* v. *Maude*, 6 Mad. 15; *Pearson* v. *Pearson*, 1 Sch. & Lef. 10.)

In the absence of a direction to the contrary the rate of interest is 4 per cent. per annum. (R. S. C. O. LV. r. 64; see *Re Davy*, [1908] 1 Ch. 61.)

"Wherever legacies are given out of personal estate, consisting of outstanding securities, those legacies cannot be actually paid, until the money due on such securities is actually got in: but by a rule, that has been adopted for the sake of general convenience, this Court holds the personal estate to be reduced into possession within a year after the death of the testator. Upon that ground interest is payable upon legacies from that time, unless some other period is fixed by the will. Actual payment may in many instances be actually impracticable within that time: yet in legal contemplation the right to payment exists, and carries with it the right to interest until actual payment." (*Per* Grant, M. R., in *Wood* v. *Penoyre*, 13 Ves. at p. 333.)

The fact that a general legacy can only be paid out of a reversionary interest does not prevent interest from running before the falling in of the reversion. (*Walford* v. *Walford*, [1912] A. C. 658.)

Future legacy.

"The rule of law is clear, and there can be no controversy with regard to it, that a legacy payable at a future day carries interest only from the time fixed for its payment. On the other hand, where no time for payment is fixed, the legacy is payable at, and therefore bears interest from, the end of a year after the testator's death, even though it be expressly made payable out of a particular

fund which is not got in until after a longer interval." (*Per* Lord Cairns, C., in *Lord* v. *Lord*, L. R. 2 Ch. at p. 789.)

Settled legacy.

If an annuity is given, the first payment (in the absence of a contrary direction) is at the end of a year from the testator's death, "but if a legacy is given for life, with remainder over, no interest is due till the end of two years. It is only interest of the legacy; and till the legacy is payable, there is no fund to produce interest." (*Per* Lord Eldon, C., in *Gibson* v. *Bott*, 7 Ves. at p. 96.)

Exceptions.

Contingent legacies.

Contingent legacies.—In general a contingent legacy does not carry interest while it is contingent (*Wyndham* v. *Wyndham*, 3 B. C. C. 58), unless the legacy has to be severed from the rest of the testator's estate for the benefit of the legatee. (See *Re Inman*, [1893] 3 Ch. 518.)

Power of maintenance.

A power to executors to maintain an infant out of a legacy given to him if he attains twenty-one is sufficient to make the legacy carry interest for the purpose of maintenance, but not where provision is made for the maintenance of the legatee out of some other fund. (*Re West*, [1913] 2 Ch. 345.)

Legacy to infant.

Legacy to infant.—A legacy given to an infant to whom the testator is *in loco parentis* carries interest by way of maintenance from the testator's death, if there is no other provision for the infant's maintenance.

"It is very clear that when a father gives a legacy to a child, whether it be a vested legacy, or not, it will carry interest from the death of the testator, as a maintenance for the child; but this will be only where no other fund is provided for such maintenance." (*Per* Lord Kenyon, M. R., in *Wynch* v. *Wynch*, 1 Cox, at p. 434.)

As to maintenance under sect. 43 of the Conveyancing Act, 1881, see *ante*, Chap. IX., p. 76.

Legacy to creditor.

Legacy to creditor.—A legacy to a creditor in satisfaction of his debt carries interest from the testator's death (*Clark* v. *Sewell*, 3 Atk. 96), since, in general, future or contingent legacies will not satisfy a present debt; but this would not apply to a legacy given in satisfaction of somebody else's debt. (*Askew* v. *Thompson*, 4 K. & J. 620.)

Legacy charged on land.

Legacy charged on land.—Where the legacy is charged on land only interest runs from the testator's death (*Pearson* v. *Pearson*, 1 Sch. & Lef. 10); but not if the legacy is charged on land in aid of the personalty, or is payable out of the proceeds of sale of land directed to be sold at the testator's death. (*Turner* v. *Buck*, L. R. 18 Eq. 301.) If, however, the land is directed to be sold on the death of a tenant for life (with a power to postpone the sale), and legacies are given out of the proceeds of sale, it seems that interest runs from the death of the tenant for life. (*Re Waters*, 42 Ch. D. 517.)

Ademption of Specific Bequest.

Ademption of specific bequest.

RULE. A specific bequest fails if the subject-matter of the gift has ceased to form part of the testator's estate before his death. (*Ashburner* v. *Macguire*, 2 B. C. C. 108.)

Stock.

Thus, a specific bequest of stock fails, or in technical language, is adeemed, either wholly or *pro tanto*, if the stock or part of it has been sold in the testator's lifetime. (*Humphreys* v. *Humphreys*, 2 Cox, 184.)

Intention not material.

The intention of the testator is not material. "When the case of *Ashburner* v. *McGwire* was before me, I took all the pains I could to sift the several cases upon the subject, and I could find no certain rule to be drawn from them, except this, to inquire whether the legacy was a specific legacy (which is generally the difficult question in these cases), and if specific, whether the thing remained at the testator's death; and one must consider it in the

same manner as if a testator had given a particular horse to A. B. if that horse died in the testator's lifetime, or was disposed of by him, then there is nothing on which the bequest can operate." (*Per* Lord Thurlow in *Stanley* v. *Potter*, 2 Cox, at p. 182; see *Re Slater*, [1907] 1 Ch. at p. 671.)

Nominal change does not cause ademption, *e.g.*, conversion of shares into stock.

A mere nominal change in the subject-matter of a bequest does not give rise to ademption; but it is difficult to know what is a mere nominal change. In *Oakes* v. *Oakes* (9 Hare, 666, overruled on the point whether stock can pass as shares by *Morrice* v. *Aylmer*, L. R. 7 H. L. 717), it was held that the conversion of fully paid shares into stock was not a sufficient change to cause ademption; and it seems that where shares are merely sub-divided there is no ademption (*Re Clifford*, [1912] 1 Ch. 29), or even when on a reconstruction shares in the new company are substituted for shares in the old. (*Re Leeming*, [1912] 1 Ch. 828—a strong case.)

Cases of ademption.

On the other hand, it has been held that there is ademption where stock in a water company was by Act of Parliament converted into Water Board Stock (*Re Slater*, [1907] 1 Ch. 665), or where debentures were exchanged for a smaller nominal amount of permanent debenture stock. (*Re Lane*, 14 Ch. D. 856.)

General legacy of stock.

Here it may be remarked that a simple legacy of stock or shares (as, "I give 1,000*l.* Consols") is a general legacy (see Hawkins on Wills, Chapter XXI.), and in such a case, if the nature of the stock or shares is changed in the testator's lifetime, different principles apply. (See *Re Gillins*, [1909] 1 Ch. 345.)

Ademption by removal.

Ademption by removal.—A specific bequest may be generic, as of a class of objects, *e.g.*, "my household furniture." In such a case the will speaks from the death. (Wills Act, 1837, s. 24; *Bothamley* v. *Sherson*, L. R. 20 Eq. at p. 312.) Such bequests are often made by reference to the position of chattels at the time of the testator's death, as a bequest of "all the pictures in my house at the date of my death." If, then, some of the objects have been

Description of chattels by reference to position.

removed for a temporary purpose, it may be a question whether or not they pass under the bequest. Thus, jewels placed at a banker's for safe custody have been held to pass. (*Re Johnston*, 26 Ch. D. 538.) The subject of "ademption by removal," as it is sometimes called, is fully discussed in Jarman on Wills, pp. 1098 *et seq.*

Abatement of Legacies.

Testators sometimes give legacies without leaving sufficient assets to provide for them.

General legacies abate *pari passu.*

Rule. If the fund for payment of general legacies is insufficient, then in the absence of a contrary direction the general legacies abate *pari passu.* (*Barton* v. *Cooke*, 5 Ves. 461, 464; *Re Turnbull*, [1905] 1 Ch. 726; *Re Wedmore*, [1907] 2 Ch. 277, 283.)

If a legacy is given free of duty, the amount of the duty is a further pecuniary legacy. (*Re Turnbull, supra.*)

Annuities.

Annuities are legacies; for the purpose of abatement their capital value has to be ascertained. In the case of immediate annuities if the annuitant is dead when it is ascertained that the assets are insufficient for payment in full, the value is taken to be what the annuitant ought actually to have received (*Todd* v. *Beilby*, 27 Beav. 353); but if the annuitant is alive the value is the arrears plus the calculated present value of the annuity. (*Re Wilkins*, 27 Ch. D. 703.)

Where an annuity is reversionary its present value must be taken. (*Potts* v. *Smith*, L. R. 8 Eq. 683; *Re Metcalf*, [1903] 2 Ch. 424.)

Legacy in lieu of dower.

Exception—Legacy in lieu of dower.—A legacy to the testator's widow in satisfaction of her dower has priority (*Re Greenwood*, [1892] 2 Ch. 295; and see sect. 12 of the Dower Act, 1833); but this doctrine is not extended to other cases where a legacy is given in satisfaction or

substitution for some other interest of the legatee so as to raise a case of election. (*Re Wedmore*, [1907] 2 Ch. 277; *Re Whitehead*, [1913] 2 Ch. 56.)

Legacy to widow,

It may be mentioned that, apart from any express direction in the will, neither a legacy to the testator's widow to be paid immediately after the testator's death (*Re Schweder's Estate*, [1891] 3 Ch. 44), nor a legacy to an executor for his trouble (*Duncan* v. *Watts*, 16 Beav. 204), has any priority.

to executor.

Demonstrative legacies.

Demonstrative legacies.—A demonstrative legacy—that is, a general legacy which is primarily to be paid out of a particular fund (see *per* Page-Wood, V.-C., in *Paget* v. *Huish*, 1 H. & M. at p. 668) does not fail if the particular fund is non-existent at the testator's death, but ranks with the other general legacies. (*Robinson* v. *Geldard*, 3 Mac. & G. 735, at p. 745.)

The explanation of the case of *Selwood* v. *Mildmay* (3 Ves. 306) seems to be that Lord Alvanley treated the legacy as demonstrative, though it certainly appeared to be specific.

Abatement of demonstrative legacy.

"A demonstrative legacy is liable to abate when it becomes a general legacy by reason of the failure of the fund out of which it is payable." (*Per* Kindersley, V.-C., in *Mullins* v. *Smith*, 1 Dr. & Sm. at p. 210.) This seems to mean that if part only of the demonstrative legacy can be discharged out of the fund the residue of it will abate *pari passu* with the other general legacies.

Abatement of specific legacies.

Specific legacies.—"When the assets, not specifically bequeathed, are insufficient to pay all the debts, then the specific legatees must abate, in proportion to the value of their individual legacies." (Williams on Executors, 10th ed. p. 1100.)

CHAPTER XIII.

TENANT FOR LIFE AND REMAINDERMAN.

Allhusen v. *Whittell.*

Rule in *Allhusen* v. *Whittell.*

RULE. The income arising within a year after the testator's death from so much of his estate as is required for the payment of debts and legacies is not to be deemed as income arising from his residuary estate in the absence of a contrary intention expressed in the will. (*Allhusen* v. *Whittell*, L. R. 4 Eq. 295.)

Statement of the principle.

"What I apprehend to be the true principle is, that, in the book-keeping which the Court enters upon for the purpose of adjusting the rights between the parties, it is necessary to ascertain what part, together with the income of such part for a year, will be wanted for the payment of debts, legacies, and other charges, during the year; and the proper and necessary fund must be ascertained by including the income for one year which may arise upon the fund which may be so wanted. . . . It is clear that the tenant for life ought not to have the income arising from what is wanted for the payment of debts, because that never becomes residue in any way whatever." (*Per* Wickens, V.-C., L. R. 4 Eq. at p. 303.)

Real estate.

The rule applies to real estate. (*Marshall* v. *Crowther*, 2 Ch. D. 199.) A form of clause to negative the rule is given in Key and Elphinstone's Precedents, 9th ed. Vol. II. p. 864.)

How rule is applied when estate is

There has been some difference of judicial opinion as to the correct method of applying the rule where the

testator's estate is charged with an annuity. In *Re Perkins* ([1907] 2 Ch. at p. 599), Swinfen Eady, J., said, quoting *Re Bacon* (62 L. J. Ch. 445): "The proper course is to deal with each payment as it accrues . . . that is to say, ascertain what sum set aside at the death of the testatrix and accumulated at 4 per cent. would have met the particular payment, and attribute that part of the payment to capital . . . and attribute the remaining part to income," but directed the calculation to be made at 3 per cent. In *Re Poyser* ([1910] 2 Ch. 444), Parker, J., followed *Re Perkins*, except that he directed the calculation to be at $3\frac{1}{2}$ per cent. He said: "I also agree with Swinfen Eady J. that when it is determined that there shall be some apportionment as between tenant for life and remainderman the method of carrying out that is in the discretion of the Court" (p. 448). charged with an annuity.

In *Lambert* v. *Lambert* (L. R. 16 Eq. 320), it was held that the circumstance that the debts and legacies were paid within a year did not affect the application of the rule, with the result that part of the capital of the debts, as well as the interest of the debts, was paid out of income; but in *Re McEuen* ([1913] 2 Ch. 704), Sargant, J., held that the rule was not to be applied in this way, and that the period for which interest is to be reckoned and debited against the tenant for life is not the whole year from the testator's death, but only the part of the year which has elapsed before actual payment of the debts. *Lambert* v. *Lambert*.

Howe v. *Lord Dartmouth.*

Where a testator bequeaths his residuary personal estate to persons in succession, an artificial rule of administration "often calculated to defeat what the testator would have wished in order to give effect to his intentions" (4 Jur. N. S. 1269), was invented by Lord Eldon.

RULE. Where a testator bequeaths his residuary personal estate to persons in succession then, unless a contrary intention is shown by will, all Rule in *Howe* v. *Lord Dartmouth*.

such parts as are not investments authorised by law for the investment of trust funds should be converted and invested in such investments. (*Howe* v. *Lord Dartmouth*, 7 Ves. 137.)

Statement of the rule.

"I take the result of the rule laid down by Lord Eldon in *Howe* v. *Lord Dartmouth* [7 Ves. 138], and by Lord Cottenham in *Pickering* v. *Pickering* [4 Myl. & Cr. 289], to be, that, where personal estate is given in terms amounting to a general residuary bequest, to be enjoyed by persons in succession, the interpretation the Court puts upon the bequest is, that the persons indicated are to enjoy the same thing in succession; and, in order to effectuate that intention, the Court, as a general rule, converts into permanent investments so much of the personalty as is of a wasting or perishable nature at the death of the testator, and also reversionary interests. The rule did not originally ascribe to testators the intention to effect such conversions, except in so far as a testator may be supposed to intend that which the law will do; but the Court, finding the intention of the testator to be that the objects of his bounty shall take successive interests in one and the same thing, converts the property, as the only means of giving effect to that intention." (*Per* Wigram, V.-C., in *Hinves* v. *Hinves*, 3 Hare, at p. 611.)

Leaseholds.

The rule applies to leaseholds (*Morgan* v. *Morgan*, 14 Beav. 72), except where they are situate abroad. (*Re Moses*, [1908] 2 Ch. 235.)

Reversionary interests.

The rule is also applied to reversionary interests for the benefit of the tenant for life. (*Wilkinson* v. *Duncan*, 23 Beav. 469.)

The rule does not apply to an absolute gift subject to an executory limitation over. (*Re Bland*, [1899] 2 Ch. 336.)

Rule does not apply to real estate.

It would be natural to suppose that the rule would also apply to real estate where it consists of property of a wasting nature, such as mines or brickfields, or where the income will largely increase in the future, as where it consists of freehold ground rents, with a near reversion to the rack-rents, but this is not the case.

Contrary intention.

Contrary intention.—"If the will expresses an intention that the property as it existed at the death of the testator shall be enjoyed in specie, although the property be not, in a technical sense, specifically bequeathed, to such a case the rule does not apply." (*Per* Wigram, V.-C., in *Hinves* v. *Hinves*, 3 Hare, at p. 611.)

It is a matter of construction to determine whether the testator has indicated that the rule shall not apply. The cases turn on fine distinctions, and are not altogether satisfactory.

How rule may be excluded.

A mere enumeration of some particulars in a residuary bequest is not, by itself, sufficient to make the bequest specific or to exclude the operation of the rule. (*Re Tootal's Estate*, 2 Ch. D. 628.)

A power of sale may be sufficient to exclude the rule. (*Re Pitcairn*, [1896] 2 Ch. 199.)

A trust for conversion at a future period implies that the property is not to be converted at an earlier date, and thus excludes the rule. (*Alcock* v. *Sloper*, 2 My. & K. 699.)

A power to retain investments excludes the rule while the investments are retained. (*Re Bates*, [1907] 1 Ch. 22; see *Re Wilson*, [1907] 1 Ch. 394.)

At the present time the tendency of the Courts seems to be to apply the rule strictly (almost as if it were a rule of construction), unless there are extremely clear indications in the will that the rule is not to be applied. (See *Re Wareham*, [1912] 2 Ch. 312, and the cases there referred to.)

Course to be adopted if property is not actually converted.

Where the property subject to the rule is not actually converted within a year of the testator's death, the proper course seems to be to ascertain the income which would be produced if the sale had actually been made at the end of the year and the proceeds invested in Consols, and to pay the income so ascertained to the tenant for life and capitalise the rest. (*Re Wareham*, [1912] 2 Ch. 312.)

Meyer v. *Simonsen.*

Where there is an express trust for conversion, a well-drawn will usually contains, in addition, a power to postpone conversion, and a direction as to the destination of the income until conversion.

In the absence of such a power and direction the Court adopts the following:—

Rule in *Meyer* v. *Simonsen.*

RULE. Where personal property subject to a trust for conversion is not capable of immediate conversion the property should be valued and 4 per cent. on such value paid to the tenant for life; the residue of the income should be invested, but the tenant for life is entitled to the income produced by such investments. (*Meyer* v. *Simonsen*, 5 De G. & S. 723; *Brown* v. *Gellatly*, L. R. 2 Ch. 751.)

Statement of rule.

"In this country, in the case of income-producing property directed by will to be converted, but retained for a time unconverted for the benefit of the estate, it has been the practice of the Court to put a value on the property, and to allow the tenant for life out of the income actually produced a sum equal to 4 per cent. on such value. That was the rule laid down by Parker V.-C. in *Meyer* v. *Simonsen* [5 De G. & Sm. 723], and followed by Lord Cairns in *Brown* v. *Gellatly* [L. R. 2 Ch. 751]." (*Per* Lord Macnaghten in *Wentworth* v. *Wentworth*, [1900] A. C. at p. 171.)

In *Meyer* v. *Simonsen* there was no express trust for conversion, but the trustees had a duty to convert under the rule in *Howe* v. *Lord Dartmouth*.

Modification of rule where power is given to postpone conversion.

Power to postpone conversion.—Where a residue of personalty is given upon trust for sale, with a power to postpone conversion, but there is no direction as to the income until conversion, a similar rule applies, except that the tenant for life is not entitled to the income of the

accumulations arising from so much of the income as exceeds 4 per cent.

"The question depends upon the conventional rule which has been adopted by the Court in cases where a testator has disposed of his property to trustees upon trust for sale with a discretionary power to postpone the conversion of all or any part of the estate, and has given his property to a tenant for life with remainder over, but has not provided that until sale the tenant for life shall have the benefit of the actual income produced by the unauthorised securities which, under the discretion to postpone, the trustees may have retained. The Court in such a case has adopted a rule of taking the estimated capital value of the unauthorised securities at the death of the testator and allowing to the tenant for life 4 per cent. interest upon the estimated amount, and directing that in regard to the surplus income arising out of the unauthorised investments there should be accumulation and capitalisation of that income." (*Per* Neville, J., in *Re Owen*, [1912] 1 Ch. at p. 523.)

Rule as to real estate.

Real estate.—But where the residue consists of both real and personal property, the tenant for life is entitled to the rents of the unsold real estate. (*Re Oliver*, [1908] 2 Ch. 74.)

"I think that the authorities are clear that where there is a trust for sale of real estate, and the proceeds are settled on a tenant for life, then, at any rate so long as the sale is not improperly postponed, the person entitled to the income of the proceeds is entitled to the rents and profits of the estate until sale." (*Per* Kekewich, J., in *Re Searle*, [1900] 2 Ch. at p. 832.)

Apportionment of Income.

The Apportionment Act, 1870, gives rise to the following:—

Income is apportionable.

RULE. In the absence of a contrary intention expressed in the will, all rents, annuities, divi-

dends and other periodical payments in the nature of income are considered as accruing from day to day, and apportionable in respect of time. (Apportionment Act, 1870, s. 2.)

Apportionment Act, 1870.

"All rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." (Apportionment Act, 1870, s. 2.)

Sect. 5 of the Act contains wide definitions of "rents" and "dividends."

The Act apportions not only the rights of the persons to receive the income, but the liability of the persons to pay it. (*Rochester* v. *Le Fanu*, [1906] 2 Ch. 513.)

Act only applies to income not accrued due.

"The Act is only intended to apply to sums which are accruing but have not accrued due at the time when the apportionment is said to be required. The Act does not, in my opinion, apply to any sum duly and properly paid or accrued due before the happening of the incident which is said to necessitate or require the apportionment." (*Per* Romer, L. J., in *Ellis* v. *Rowbotham*, [1900] 1 Q. B. at p. 744.)

Specific property.

The income arising from property specifically bequeathed (*Pollock* v. *Pollock*, L. R. 18 Eq. 329), and the rents from land specifically devised (*Hasluck* v. *Pedley*, L. R. 19 Eq. 271), are apportionable; and the apportioned part of the income or rents up to the death will fall into the general personal estate, unless the same are specifically bequeathed as in *Re Ford* ([1911] 1 Ch. 455).

Shares in a "private" company.

A company incorporated under the Companies Acts is a public company within the Apportionment Act, 1870 (*Re Lysaght*, [1898] 1 Ch. 115), although it may be a private company within sect. 121 of the Companies (Consolidation) Act, 1908. (*Re White*, [1913] 1 Ch. 231.)

Where trustees sell or purchase an investment between two dividend days there is no apportionment (*Scholefield* v. *Redfern*, 2 Dr. & Sm. 173), except in exceptional cases (*Bulkeley* v. *Stephens*, [1896] 2 Ch. 241). Change of investment by trustees.

Specifically bequeathed Property.

It may be convenient to mention the rights of tenant for life and remainderman in relation to certain particular kinds of property.

Shares in trading companies.—Companies sometimes declare a "bonus" in addition to a dividend, and the question then arises whether such a bonus is income or capital; on this subject the leading case is *Bouch* v. *Sproule* (12 A. C. 385). The following rules are taken from Jarman on Wills, pp. 1223 *et seq.*, and are based upon that case and the other cases quoted below. Bonus.

(a) The decision of the company as to what is capital and what is income is binding on the tenant for life and remainderman. Rules deduced from *Bouch* v. *Sproule*.

(b) If a company has power to increase its capital, it cannot be considered as having converted its profits into capital when it has not taken the proper steps to increase its capital, and consequently any bonus or dividend distributed is not capital.

(c) But, conversely, if a company applies part of its earnings in increasing its capital, and issues new shares to represent the money so applied, the new shares are capital. (*Re Evans*, [1913] 1 Ch. 23.)

(d) If a company has no power to increase its capital, it may be that a bonus out of accumulated profits is capital if the company has, in fact, used them for capital purposes.

(e) Where a company is wound up, and there is a surplus after payment of debts and repaying to the shareholders the capital paid upon their shares, such surplus is capital (*Birch* v. *Cropper*, 14 A. C. 525; *Re Armitage*, [1893] 3 Ch. 337); but whether a reserve fund of undivided profits is to be treated as income seems to depend

upon the regulations of the company. (*Re Crichton's Oil Company*, [1902] 2 Ch. 86, and the cases there referred to; *Re W. S. Hall & Co., Limited*, [1909] 1 Ch. 521.)

(f) If a company declares a dividend, and at the same time gives the shareholders an option to take up new shares with the amount of the dividend, the value of the dividend is income, and the value of the option is capital. (*Re Northage*, 64 L. T. 625; *Re Malam*, [1894] 3 Ch. 578.)

Payments out of profits.

If a company purport to pay profits to shareholders in reduction of the paid-up capital, but in doing so does not comply with the provisions of the Companies Acts, the money so paid to the shareholders is income. (*Re Piercy*, [1907] 1 Ch. 289.)

"The true rule to be inferred from the cases as between tenant for life and remainderman seems to me to be that the tenant for life is entitled to all payments out of profits made by the company, unless they have been validly capitalised by the company by resolution or otherwise." (*Per* Neville, J., [1907] 1 Ch. at p. 294.)

Rent and covenants of leases.

Leaseholds.—A tenant for life of leaseholds has to perform the continuing obligations of the lease during the continuance of his interest. "I am of opinion that a tenant for life, whether legal or equitable, is within the maxim, 'Qui sentit commodum sentire debet et onus': that he is bound to take the *onus* with the *commodum*, and that as head-rent and taxes are ordinary burdens which a tenant in occupation of leaseholds must bear, the testator's widow is liable to pay them out of her own money during her occupancy" (*per* Chatterton, V.-C., in *Kingham* v. *Kingham*, [1897] 1 Ir. 170; quoted by North, J., in *Re Betty*, [1899] 1 Ch. at p. 828); but a tenant for life is not liable to do the repairs which had become necessary at the testator's death. (*Re Courtier*, 34 Ch. D. 136.) Where the property is vested in trustees they are entitled to apply the rents in repairs (*Re Fowler*, 16 Ch. D. 723); but this does not affect the relative rights

of tenant for life and remainderman. (*Re Courtier, supra.*)

Rent due at the testator's death, and the then existing liability under the covenants to repair, are liabilities of the testator's estate to be borne in the same way as his other debts.

Renewable leaseholds.

Renewable leaseholds and copyholds.—Where renewable leaseholds are bequeathed in succession, the fines for renewal are borne by the tenant for life and remainderman in proportion to their actual enjoyment. (*Nightingale* v. *Lawson*, 1 Br. C. C. 440; *Bradford* v. *Brownjohn*, L. R. 3 Ch. 711.)

Copyholds.

So fines and fees on the admission of new trustees to copyholds are borne by tenant for life and remainderman in proportion to their interests.

Casual profits.

Casual profits.—"What is the position of the tenant for life of a settled estate? He takes all casual profits which accrue during the time of his tenancy for life. Thus the tenant for life of a manor takes the fines arising from copyholds, because they become payable under an obligation arising from the custom." (*Per* Jessel, M. R., in *Brigstocke* v. *Brigstocke*, 8 Ch. D. at p. 362.)

So, a tenant for life takes fines paid for the renewal of leases (*Re Medows*, [1898] 1 Ch. 300), or money paid for accepting the surrender of a lease not granted under the Settled Land Acts (*Re Hunloke's S. E.*, [1902] 1 Ch. 941); but not if the lease was granted under those Acts. (*Re Rodes*, [1909] 1 Ch. 815.)

As to damages recovered for breaches of a covenant to repair, see *Re Lacon's Settlement*, [1911] 2 Ch. 17; and *Re Pyke*, [1912] 1 Ch. 770.

CHAPTER XIV.

SECRET TRUSTS.

Although, in general, parol evidence is not admissible to show the testator's intention, yet if a person induces a testator to leave property to him on the representation that he will hold it in trust for certain other persons, it would be a fraud if the legatee could keep the gift so obtained for his own benefit. Consequently, in such a case a Court of Equity will enforce the trust, and we have the following:—

Secret trusts.

Rule. If A. induces B. either to make or to abstain from revoking a will leaving him property, by expressly promising or tacitly consenting to carry out B.'s wishes concerning it, the Court will hold this to be a trust and compel A. to execute it. (*McCormick* v. *Grogan*, L. R. 4 H. L. 82; *Re Stead*, [1900] 1 Ch. at p. 240.)

Statement of principle.

"There is another well-known class of cases where no trust appears on the face of the will, but the testator has been induced to make the will, or, having made it, has been induced not to revoke it by a promise on the part of the devisee or legatee to deal with the property, or some part of it, in a specified manner. In these cases the Court has compelled discovery and performance of the promise, treating it as a trust binding the conscience of the donee, on the ground that otherwise a fraud would be committed, because it is to be presumed that if it had not been for such promise the testator would not have made or would have revoked the gift. The principle of these decisions

is precisely the same as in the case of an heir who has induced a testator not to make a will devising the estate away from him by a promise that if the estate were allowed to descend he would make a certain provision out of it for a named person: *Stickland* v. *Aldridge* [9 Ves. 516]; *Wallgrave* v. *Tebbs* [2 K. & J. 313]; *McCormick* v. *Grogan* [L. R. 4 H. L. 82]." (*Per* Kay, J., in *Re Boyes*, 26 Ch. D. at p. 535.)

Tenants in common.

"If A. induces B. either to make, or to leave unrevoked, a will leaving property to A. and C. as tenants in common, by expressly promising, or tacitly consenting, that he and C. will carry out the testator's wishes, and C. knows nothing of the matter until after A.'s death, A. is bound, but C. is not bound: *Tee* v. *Ferris* [2 K. & J. 357]; the reason stated being, that to hold otherwise would enable one beneficiary to deprive the rest of their benefits by setting up a secret trust. If, however, the gift were to A. and C. as joint tenants, the authorities have established a distinction between those cases in which the will is made on the faith of an antecedent promise by A. and those in which the will is left unrevoked on the faith of a subsequent promise. In the former case, the trust binds both A. and C.: *Russell* v. *Jackson* [10 Hare, 204]; *Jones* v. *Badley* [L. R. 3 Ch. 362], the reason stated being that no person can claim an interest under a fraud committed by another; in the latter case A. and not C. is bound: *Burney* v. *Macdonald* [15 Sim. 6]; and *Moss* v. *Cooper* [1 J. & H. 352], the reason stated being that the gift is not tainted with any fraud in procuring the execution of the will." (*Per* Farwell, J., in *Re Stead*, [1900] 1 Ch. at p. 241.)

Discretion no trust.

If, however, the legatee is given an absolute discretion, although the testator has communicated to him his ideas as to the distribution of the property, there is no binding trust. (*McCormick* v. *Grogan*, L. R. 4 H. L. 82; *Re Pitt-Rivers*, [1902] 1 Ch. 403.)

Trustee, but no trusts declared.

On the other hand, if it is expressed on the face of the will that a legatee is a trustee, but no trusts are declared by the will, then no trust subsequently declared

by a paper not executed as a will is binding. In such a case the legatee would be trustee for the next of kin. (See *per* Kay, J., in *Re Boyes*, 36 Ch. D. at p. 535.)

Evidence admissible to prove trust.

Notwithstanding that the will states that there is no trust, evidence is admissible to prove that there is in fact a trust (*Re Spencer's Will*, 57 L. T. 519); but a mere power to dispose of property in accordance with the testator's wishes verbally expressed is void for uncertainty, and parol evidence is not admissible to show what the wishes were. (*Re Hetley*, [1902] 2 Ch. 866.)

Secret trust of part of residue.

Where a secret trust affects part of the residue, this part is, in effect, a specific bequest, and is not liable for the testator's debts until the other part of the residue has been exhausted. (*Re Maddock*, [1902] 2 Ch. 220.)

PART II.

INTESTACY.

A PERSON dies wholly intestate if he or she has left no will, or if all the dispositions of the will have failed by lapse or otherwise. Partial intestacy occurs where the will does not effectively dispose of all the testator's real and personal estate. Persons, however, often have interests which cannot be disposed of by will, or have powers of appointment over property, the destination of which, in default of appointment, is determined by the instrument creating the power. In cases of intestacy the law determines how the property which could have been disposed of by will (except by the exercise of a power) shall devolve after payment of the debts, funeral and testamentary expenses and death duties. The devolution of real or immoveable property follows the *lex loci*, the devolution of the personal or moveable property follows the law of the domicil. (*Enohin* v. *Wylie*, 10 H. L. C. 1.) In English law the rules as to real property are entirely different from those as to personal property, including leaseholds. Subject to the rights of a surviving husband or wife the real property of an intestate descends to the heir-at-law, while the personal property is distributed amongst the statutory next of kin. It is therefore necessary to determine, in the first place, what property is real and what personal; then to ascertain the rights of the widow or surviving husband; and then to ascertain the heir-at-law and statutory next of kin.

Total and partial intestacy.

Immoveable property follows *lex loci*, moveable, the law of the domicil.

In English law realty descends to the heir, personalty is distributed among the next of kin.

For the purposes of estate duty, however, it becomes necessary to ascertain the property which passes on the death, or is deemed to pass on the death, of the intestate

or testator, although such property cannot be disposed of by will.

Property which passes on death of—joint tenant; tenant in tail.

On the death of a joint tenant the surviving joint tenants or tenant take the deceased's share by survivorship; again, on the death of a tenant in tail in possession the entailed estate descends to the next heir in tail *per formam doni* under the Statute *De Donis Conditionalibus* subject to dower or curtesy (see Chapters XVI. and XV.).

Executors are trustees of undisposed-of residue for statutory next of kin.

Under the Executors Act, 1830, when a person dies, "having by his or her will, or any codicil or codicils thereto, appointed any person or persons to be his or her executor or executors, such executor or executors shall be deemed by Courts of Equity to be a trustee or trustees for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions in respect of any residue not expressly disposed of, unless it shall appear by the will, or any codicil thereto, the person or persons so appointed executor or executors was or were intended to take such residue beneficially."

The following chapters discuss the rights of the husband, the widow, the heir and the next of kin to beneficial interests which could have been disposed of by will (otherwise than by appointment) after the funeral and testamentary expenses and debts have been paid. In general, the result of a partial intestacy is (as regards the property undisposed of) the same as if the testator had died totally intestate possessed only of such property, but this is subject to exceptions (*e.g.*, the Intestates' Estates Act, 1890, applies only in cases of total intestacy).

In what follows it is assumed that the intestate died domiciled in England, without having any immoveable property outside England.

CHAPTER XV.

THE RIGHTS OF THE SURVIVING HUSBAND.

I. *Personal Property.*

On the death of a woman intestate her husband was entitled to administration as next and most lawful friend under 31 Edw. III. st. 1, c. 11, and as such became entitled to the personal estate after payment of debts and funeral expenses. To avoid any question as to whether this right was affected by the Statute of Distributions, it was provided by sect. 25 of the Statute of Frauds (29 Car. II. c. 3, made perpetual by 1 Jac. II. c. 17, s. 5), that neither the Statute of Distributions, nor anything therein contained, "shall be construed to extend to the estates of *feme coverts* that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same as they might have done before the making of the said Act." Consequently we have the following:—

Surviving husband takes wife's personalty.

Rule. A surviving husband is entitled to all the personal estate in respect of which his wife dies intestate. (*Re Lambert's Estate*, 39 Ch. D. 626.)

A married woman cannot, by will, dispose of personal property, which is not held to her separate use, without the assent of her husband. (*Elliot* v. *North*, [1901] 1 Ch. 424.) As a consequence of the Married Women's Property Act, 1882, the cases in which a married woman has property not to her separate use are becoming uncommon.

This has caused a change in the practice of the Probate Division. "The present practice of the Probate Court is not to grant probate of the will of a married woman to the executors in respect of such personal estate as she had power to dispose of by will, and to grant letters of administration *cæterorum* to the husband, which was the old practice, but to grant to the executors probate in general terms, and not to grant any administration to the husband." (*Per* Cotton, L. J., in *Smart* v. *Tranter*, 43 Ch. D. at p. 591.)

Chattels real of wife.

In the case of chattels real of a wife where there was no separate use the husband had, if they were in possession, power to dispose of them during the coverture, and on the death of the wife the husband became entitled *jure mariti* without taking out letters of administration.

"There is no doubt that as to all chattels real of the wife vested in possession during the coverture the husband surviving need not take out administration to the wife. And the rule is the same as to an equitable term." (*Per* Kay, J., in *Re Bellamy*, 25 Ch. D. at p. 623.)

But although the husband need not in such a case take out administration, he does not get the term free from his wife's debts. (*Surman* v. *Wharton*, [1891] 1 Q. B. 491.)

II. *Real Property.*

The husband's rights in his deceased wife's real property depend upon the nature of the tenure. The rule in the case where the land is held in common socage is as follows:—

Curtesy.

The husband's curtesy.

Rule. "The Law of Curtesy gives to the surviving husband an estate for his life in his wife's hereditaments in possession, held for an estate of inheritance by a legal title of which there was actual seisin, if the nature of the property admitted of actual seisin, otherwise seisin in law, or by an equitable title, and to which there was any issue

born during the marriage which might by possibility inherit." (First Report of Real Property Commissioners, p. 19.)

In the matter of curtesy equity followed the law (see *Cooper* v. *Macdonald*, 7 Ch. D. at p. 295), and the Married Women's Property Act, 1882, has not deprived husbands of their right to an estate by the curtesy where the wife dies intestate (*Hope* v. *Hope*, [1892] 2 Ch. 336); but she can dispose of her separate property by deed or will so as to defeat the husband's right. (*Cooper* v. *Macdonald*, 7 Ch. D. 288.)

Estate *pur auter vie.*

There is no estate by the curtesy out of an estate *pur auter vie*. (*Stead* v. *Platt*, 18 Beav. 50.)

S. 33 of Wills Act.

By virtue of the 33rd section of the Wills Act, if a man devises to his daughter in fee, who predeceases him leaving issue, the daughter's husband is entitled to an estate by the curtesy. (*Eager* v. *Furnivall*, 17 Ch. D. 115; *Re Derbyshire*, 75 L. J. Ch. 95.)

As to the evidence that the child was born alive, see *Jones* v. *Ricketts*, 31 L. J. Ch. 753, and the authorities there cited.

Curtesy may be barred by a declaration.

It seems to be possible to bar the husband's curtesy by an express declaration in the will or other document under which the wife took the land. (*Bennet* v. *Davis*, 2 P. Wms. 316.)

"At law, the husband cannot be excluded from the enjoyment of property given to or settled upon the wife; but in equity he may, and this not only partially, as by a direction to pay the rents and profits to the separate use of the wife during coverture, but wholly, by a direction, that upon the death of the wife the inheritance shall descend to the heir of the wife, and that the husband shall not be entitled to be tenant by the curtesy: such a provision was actually made in the case of *Bennett* v. *Davis*, and was actually acted upon by this Court." (*Per* Leach, V.-C., in *Morgan* v. *Morgan*, 5 Madd. at p. 411.)

"The husband does not forfeit his estate by the curtesy,

nor the wife her jointure, by adultery." (*Per* Sugden, C., in *Re Anne Walker,* Ll. & G. at p. 326.)

Gavelkind. *Gavelkind land.*—In land of socage tenure subject to the custom of gavelkind the husband's estate by the curtesy, which is sometimes called freebench, is limited to one moiety of his wife's lands, but he takes it whether or not his wife had issue by him born alive. The estate determines on the re-marriage of the husband. (Robinson on Gavelkind.)

Copyholds. *Copyholds.*—In copyholds the right to an estate by the curtesy depends upon the custom of the manor. "In some manors the husband takes the whole of the wife's land as tenant by the curtesy, in others only one-half; sometimes on condition of issue born alive, sometimes whether there be issue or not." (Third Report of Real Property Commissioners, p. 14.)

CHAPTER XVI.

THE RIGHTS OF THE WIDOW.

Rule. If a man dies totally intestate leaving a widow but no issue, his widow is entitled to £500 part of the intestate's estate, or the whole thereof if of less value. (Intestates Estates Act, 1890.)

Widow entitled to £500 if no children.

This rule, with the consequential directions that the sum is charged *pari passu* on the real and personal estate, and that such sum is without prejudice to the widow's interest and share in the residue, is enacted by the Intestates Estates Act, 1890, and applies where the intestate died after 1st September, 1890.

Intestates Estates Act, 1890.

"The real and personal estates of every man who shall die intestate after the first day of September 1890 leaving a widow but no issue shall, in all cases where the net value of such real and personal estates shall not exceed five hundred pounds, belong to his widow absolutely and exclusively." (Intestates Estates Act, 1890, s. 1.)

"Where the net value of the real and personal estates in the preceding section mentioned shall exceed the sum of five hundred pounds the widow of such intestate shall be entitled to five hundred pounds part thereof absolutely and exclusively, and shall have a charge upon the whole of such real and personal estates for such five hundred pounds, with interest thereon from the date of the death of the intestate at four per cent. per annum until payment." (*Ib.* s. 2.)

"As between the real and personal representatives of such intestate, such charge shall be borne and paid in proportion to the values of the real and personal estates respectively." (*Ib.* s. 3.)

"The provision for the widow intended to be made by this Act shall be in addition and without prejudice to her interest and share in the residue of the real and personal estates of such intestate remaining after payment of the sum of five hundred pounds, in the same way as if such residue had been the whole of such intestate's real and personal estates and this Act had not been passed." (*Ib.* s. 4.)

Sects. 5 and 6 provide for the method of valuing the real and personal estate for the purposes of the Act.

Act does not apply to partial intestacy.

The Act does not apply to cases of partial intestacy (*Re Twigg's Estate*, [1892] 1 Ch. 579), but the Act applies where the executor named in a will predeceases the testator, and all the gifts in the will fail by lapse, so that in the actual events there is a total intestacy. (*Re Cuffe*, [1908] 2 Ch. 500.) The value is to be ascertained as at the testator's death. (*Re Heath*, [1907] 2 Ch. 270.)

Personal Estate.

Subject and in addition to the previous rule we have:—

If no issue widow takes one-half, if issue one-third of the estate.

RULE. If a man dies intestate leaving a widow but no issue, the widow is entitled to one moiety of his personal estate, but if he leaves issue then the widow is entitled to one-third only of his personal estate. (22 & 23 Car. II. c. 10, ss. 5 and 6.)

The sections of the Act are set out below in Chap. XVIII., pp. 149, 150. Thus, if a man dies intestate without issue, and with no kindred, the widow will first get 500*l.* out of the real and personal estate rateably, and then one moiety of the remainder of the personalty goes to the widow, and the other moiety to the Crown. (*Cave* v. *Roberts*, 8 Sim. 214.)

This rule also applies where the intestacy is partial.

Real Estate.

RULE. A widow is entitled to live in the chief mansion house of her husband for 40 days after his death. (9 Hen. III. c. 7; 25 Ed. I. c. 7.) Quarentine.

This right is known as the widow's quarentine, and her dower ought to be assigned to her within the forty days.

"A widow, after the death of her husband . . . shall tarry in the chief house of her husband by forty days after the death of her husband, within which days her dower shall be assigned her (if it were not assigned her before) or that the house be a castle; and if she depart from the castle, then a competent house shall be forthwith provided for her, in the which she may honestly dwell, until her dower be to her assigned, as it is aforesaid; and she shall have in the meantime her reasonable estovers of the common; and for her dower shall be assigned unto her the third part of all the lands of her husband, which were his during coverture, except she were endowed of less at the church door." (Magna Carta, 9 Hen. III. c. 7; 25 Ed. I. c. 7.) *Magna Carta.*

The law of dower was completely altered by the Dower Act, 1833, which, by sect. 13, abolished two forms of dower, *ex assensu patris* and *ad ostium ecclesiae*, which were already obsolete. Dower *de la pluis beale* ceased to exist with the abolition of military tenures. (12 Car. II. c. 24.) The nature of these forms of dower is explained in Littleton.

The present law is as follows:—

RULE. The widow of a man who dies entitled to an estate of inheritance (otherwise than as a joint tenant or a trustee), whether such estate be legal or equitable, or who has a beneficial interest either wholly equitable or partly legal and partly equitable equal to an estate of inheritance in possession, is entitled to dower out of such land unless the dower has been barred. (Dower Act, 1833, s. 2.) Dower.

In cases of total intestacy, this rule is subject to the first rule, and the dower is subject to abatement in respect of the widow's charge of 500*l*. (*Re Charriere*, [1896] 1 Ch. 912.)

Dower before 1834.

The law before the Dower Act, 1833, is thus stated by the Real Property Commissioners (First Report, p. 16):—

"The present law of dower gives to a surviving wife a right to have assigned to her for her life one-third of all the lands and hereditaments, (with a few exceptions, such as commons *sans nombre* and personal annuities) of which her husband was seised in law, (that is, had the legal property by descent, there being at the same time no possession) or in fact, for an estate of inheritance in possession at any time during the marriage, notwithstanding any alienation or disposition which the husband may have made of the estates, or any part of them. It does not give dower out of lands to which the husband had a right, but of which he had not seisin in law or in fact."

Dower Act, 1833.

By the Dower Act, 1833, equitable estates were made liable to dower, and the necessity for the husband to be seised was got rid of by the following sections:—

"When a husband shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint tenancy), then his widow shall be entitled in equity to dower out of the same land." (Dower Act, 1833, s. 2.)

"When a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same although her husband shall not have recovered possession thereof; provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced." (*Ib.* s. 3.)

As to what is an interest equal to an estate of inheritance in possession, see *Re Michell* ([1892] 2 Ch. 87), and *Lemon* v. *Mark* ([1899] 1 Ir. 416).

The Statutes of Limitation do not apply to an action by a widow for assignment of dower (*Williams* v. *Thomas*, [1909] 1 Ch. 713—the judgment of Cozens-Hardy, M. R., at p. 720, states the position of a dowress), but she may be barred by *laches*.

How right to dower may be lost,

If a woman leaves her husband and lives in adultery she loses her dower, unless she is reconciled with and cohabits with her husband. (13 Edw. I. c. 34; *Bostock* v. *Smith*, 34 Beav. 57.) If a wife divorces her husband she loses her right to dower. (*Frampton* v. *Stephens*, 21 Ch. D. 164.)

or barred.

Under sect. 6 of the Statute of Uses (27 Hen. VIII. c. 10), a woman's right to dower may be barred by a jointure.

"The Legislature long since, by the Statute 27 Hen. VIII. c. 10, provided a method of diminishing the evil to some extent, by making a jointure of a certain description given before marriage, a bar of the right of dower, though such jointure may be of inadequate value, and made to the wife before she has arrived at the age at which she is enabled to assent to such provision. Courts of Equity have enlarged the remedy by making some provisions not strictly within the terms of the statute bars of dower." (First Report of Real Property Commissioners, p. 16.)

Owing to the ease with which dower can be barred under the provisions of the Dower Act, questions do not often arise as to the effect of the statute.

Methods of barring dower since 1883.

The husband can bar his wife's dower in any land by disposing of it in his lifetime, or by his will, or by a declaration contained in any deed or will, or by a devise of any land to the widow out of which she would be entitled to dower.

"No widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her

Dower Act, 1833.

husband in his lifetime, or by his will." (Dower Act, 1833, s. 4.)

"A widow shall not be entitled to dower out of any land of her husband when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land." (*Ib.* s. 6.)

"A widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate when by the will of her husband, duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land." (*Ib.* s. 7.)

"Where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will." (*Ib.* s. 9.)

On the other hand, "No gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will." (Dower Act, 1833, s. 10.)

Legacy in lieu of dower.

A legacy in lieu of dower is entitled to priority (see sect. 12 of the Dower Act, 1833); but if the dower has been barred, for instance, by a devise of all the testator's real estate, such legacy has no priority. (*Re Greenwood*, [1892] 2 Ch. 295.)

Dower partially barred.

The Dower Act also provides that the dower may be partially barred.

"All partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower." (Dower Act, 1833, s. 5.)

"The right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the will of her husband, duly executed as aforesaid." (*Ib.* s. 8.)

Notwithstanding sect. 5, a widow's right to dower has priority over the rights of creditors of her deceased husband. (*Spyer* v. *Hyatt*, 20 Beav. 621; *Northern Banking Company* v. *McMackin*, [1909] 1 Ir. 374; see *ante*, p. 87.)

Gavelkind.

Gavelkind.—In lands of socage tenure, according to the custom of gavelkind, the widow is dowable of one-half instead of one-third of the land (third Report of the Real Property Commissioners, p. 9), but the dower only lasts so long as she continues chaste. (See *Re Maskell and Goldfinch's Contract*, [1895] 2 Ch. 525.) The Dower Act applies to gavelkind land. (*Farley* v. *Bonham*, 2 J. & H. 177.)

Borough English.

Borough English.—"In some boroughs, by custom, the wife shall have for her dower all the tenements which were her husband's." (Litt. sect. 166.)

On this Coke (Co. Litt. 111a) observes: "In some places the widow shall have the whole, or halfe, *dum sola et casta vixerit*, and the like."

In *Fletcher* v. *Ashburner* (1 Br. C. C. 497), it is stated that the widow "by the custom of burgage tenure, was entitled to hold the burgage houses in Kendal during her chaste viduity."

Copyholds.

Copyholds.—Where land is held by copy of court roll at the will of the lord, according to the custom of the manor, the widow's right, which is called freebench, depends upon the custom of the manor.

"In some manors the widow has one-third of her husband's land for her dower or freebench, in others one-half of the entirety; sometimes she holds it absolutely for her life, sometimes while she remains sole, and sometimes only while she remains sole and chaste; the forfeiture being sometimes absolute, and sometimes redeem-

able." (Third Report of Real Property Commissioners, p. 14.)

Apart from any custom to the contrary the right of freebench did not attach until the husband's death. "Under the old law, if a man surrendered his copyhold estate to the use of his will, and then devised it, the widow did not take freebench, the effect of the surrender being to destroy her title to freebench" (L. R. 19 Eq. at p. 350), and consequently since copyholds are now devisable, notwithstanding that the testator may not have surrendered the same to the use of his will (Wills Act, 1837, s. 3), a devise of the copyholds bars the widow's right to freebench thereout. (*Lacey* v. *Hill*, L. R. 19 Eq. 346.) The Dower Act, 1833, does not apply to freebench so as to give the widow a right to freebench out of land to which the husband was not at the time of his death tenant on the court rolls. (*Smith* v. *Adams*, 5 D. M. & G. 712.)

CHAPTER XVII.

THE HEIR-AT-LAW.

When the deceased dies intestate as to land held in fee simple, such land descends to the heir-at-law of the deceased subject to the estate in dower or curtesy of the surviving wife or husband, and subject to the rights, if any, of the widow under the Intestates Estates Act, 1890. (*Supra*, Chap. XVI., p. 129.)

The rules of descent were materially altered by the Inheritance Act, 1833. A good account of the alterations will be found in Challis on Real Property, Chap. XVI.

The present rules of the descent of an estate in fee simple held in common socage are as follows:—

Rule. Descent is traced from the last purchaser. (The Inheritance Act, 1833, s. 2.) Descent traced from purchaser.

Purchaser means "the person who last acquired the land otherwise than by descent, or than by any escheat, partition or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent." (Inheritance Act, 1833, s. 1.)

"In every case descent shall be traced from the purchaser: and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purpose of this Act, be considered to have been the purchaser thereof unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser unless it The Inheritance Act, 1833, s. 2.

shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same." (*Ib.* s. 2.)

Thus, if A. dies intestate having an estate in fee which was devised to him by will, the descent is traced from A., but if A. has acquired the estate by descent on the death of his uncle X., the descent is traced from X., unless it be proved that X. in his turn had acquired the estate by descent.

Land descends to issue.

RULE. Land descends to the issue of the last purchaser *in infinitum*.

Thus, so long as the last purchaser has any descendants male or female, one or some of them must be the heir.

Males admitted before females.

RULE. Male issue is admitted before the female.

Thus, as between a son and a daughter of the purchaser the son, though younger, is the heir.

Eldest male inherits, females inherit as coparceners.

RULE. Where two or more of the male issue are in equal degree of consanguinity to the purchaser the eldest alone inherits; but in the case of female issue the females inherit together as coparceners.

Thus, as between two sons the eldest son is the heir, but in the absence of sons two or more daughters inherit together.

Descendants represent ancestor.

RULE. The lineal descendants *in infinitum* of any person deceased represent their ancestor, and stand in the same place as their ancestor would have done if living. This right of representation is more powerful than the preceding rules where it conflicts with them.

Thus, if A., the last purchaser, dies leaving a granddaughter, the only child of his eldest son (who predeceased A.), and also another son, the granddaughter, as representing the eldest son, is preferred to the surviving son.

This right of representation applies to land of all tenures.

When the last purchaser has no issue, it is necessary to go back to his father, who, if alive, will be the heir. If the father be dead, then if issue of his are alive some or one of his issue will be heir, and the descent is traced as if such father had been the purchaser, subject to a rule giving the whole blood preference over the half-blood. If the father in this case has no issue, it is necessary to go back to the father's father, and so on.

Where no descendant, father, or descendant of father, inherits.

RULE. Every lineal ancestor is capable of being heir to any of his issue; and in every case where there is no issue of the purchaser his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue other than a nearer lineal ancestor or his issue. (Inheritance Act, s. 6.)

When all the male paternal ancestors have been exhausted, it is necessary to go to female paternal ancestors in accordance with the next two rules.

Paternal ancestors and their descendants inherit before maternal and their descendants.

RULE. None of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, are capable of inheriting until all his paternal ancestors and their descen-

dants shall have failed; and no female paternal ancestor of such person, nor any of her descendants, are capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed. (*Ib.* s. 7.)

Thus, the mother of A., the purchaser, cannot inherit so long as any paternal ancestors or any descendant of any paternal ancestor of A. is alive; and the paternal grandmother of A. cannot inherit so long as any male paternal ancestor or any descendant of any male paternal ancestor is alive.

Mother of more remote paternal ancestor or her descendants inherit before mother of less remote paternal ancestor or her descendants.

RULE. Where there is a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, are the heir or heirs of such person in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there is a failure of male maternal ancestors of such person and their descendants, the mother of his more remote male maternal ancestor, and her descendants, are the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor, and her descendants. (*Ib.* s. 8.)

Thus, the mother of a paternal grandfather and her descendants are preferred to the mother of the father and her descendants.

The position of the half-blood is determined by the following:—

The half-blood. Inheritance Act, s. 9.

RULE. Any person related to the person from whom the descent is to be traced by the half-blood is capable of being his heir; and the place in which any such relation by the half-blood stands in the order of inheritance, so as to be entitled to inherit, is the next after any relation in the same degree of the whole blood, and his issue, where the common ancestor is a male, and next after the common ancestor where such common ancestor is a female. (*Ib.* s. 9.

Thus, a brother of the half-blood on the part of the father inherits next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half-blood on the part of the mother inherits next after the mother. (Sect. 9.)

Inheritance Act, s. 4.

RULE. Where a person acquires land under a limitation to the heirs or to the heirs of the body of any of his ancestors, the land descends and the descent thereof is traced as if the ancestor named in such limitation had been the purchaser of the land. (*Ib.* s. 4.)

Notice that this applies to limitations to heirs general as well as to heirs special, whereas the rule in *Manderille's Case* (Co. Litt. 26b) did not apply to heirs general. (See *Moore* v. *Simkin*, 31 Ch. D. 95.)

On failure of heirs of purchaser, descent is traced from person last entitled.

RULE. Where there is a total failure of heirs of the purchaser, or where any land is descendible as if an ancestor had been the purchaser thereof, and there is a total failure of the heirs of such ancestor, then the descent is traced from the person last entitled to the land as if he had been

the purchaser thereof. (Law of Property Amendment Act, 1859, s. 19.)

Thus, if A., the purchaser, dies intestate leaving an only son and no other relations, on the death of the son intestate, the estate does not escheat, but will descend to the son's mother if living, or, if dead, to some other relation on the mother's side.

Posthumous heir.

Posthumous heir.—A posthumous heir is only entitled to the rents from his birth, the rents between the death of the intestate and the birth of the posthumous heir go to the qualified heir, *i.e.*, the person who is heir between the death of an intestate and the birth of a posthumous heir. (*Richards* v. *Richards*, Johns. 754; *Re Mowlem*, L. R. 18 Eq. 9.)

Qualified heir.

Escheat.

RULE. Where no heir can be ascertained the land escheats to the lord.

On the subject of escheat, see Robertson on Civil Proceedings by and against the Crown, Book IV. By the Intestates Estates Act, 1884, the law of escheat, which was formerly only applicable to a legal estate in corporeal hereditaments, is extended to any estate or interest, whether legal or equitable, in any incorporeal hereditament, and to any estate or interest in any corporeal hereditament.

The material sections of the Act, which received the Royal Assent on 14th August, 1884, are:—

The Intestates Estates Act, 1884.

"From and after the passing of this Act, where a person dies without an heir and intestate in respect of any real estate consisting of any estate or interest whether legal or equitable in any incorporeal hereditament, or of any equitable estate or interest in any corporeal hereditament, whether devised or not devised to trustees by the will of such person, the law of escheat shall apply in the same manner as if the estate or interest above mentioned were a legal estate in corporeal hereditaments." (Intestates Estates Act, 1884, s. 4.)

"Where any beneficial interest in the real estate of any deceased person, whether the estate or interest of such deceased person therein was legal or equitable, is, owing to the failure of the objects of the devise, or other circumstances happening before or after the death of such person, in whole or in part not effectually disposed of, such person shall be deemed, for the purposes of this Act, to have died intestate in respect of such part of the said beneficial interest as is ineffectually disposed of." (*Ib.* s. 7.)

In *Re Wood* ([1896] 2 Ch. 596), a testatrix died without an heir, having devised real estate upon trust for sale, and to pay thereout debts, funeral expenses and legacies, but made no disposition of the residue. It was held that the residue of the proceeds of sale escheated to the Crown.

Descent on death of a coparcener.

Coparceners.—If A., the purchaser, dies intestate leaving two daughters and no other descendants, the daughters inherit as coparceners; if, then, one of the daughters dies intestate leaving a son, it might be supposed, since under sect. 2 of the Inheritance Act, 1833, descent is to be traced from the purchaser, that one-half of the deceased daughter's share would go to her son and the other half to the surviving daughter; but, chiefly owing to the arguments of the late Mr. Joshua Williams, it has been decided that such is not the case, and that the son of the deceased daughter takes her share. (*Cooper* v. *France*, 19 L. J. Ch. 313; *Re Matson*, [1897] 2 Ch. 509.) In *Re Matson*, the son of a coparcener died intestate, and it was held that such coparcener's share descended to a grandson of the coparcener, who was a nephew of such son, to the exclusion of the descendants of the coparcener's sister.

Gavelkind.

In lands held by socage tenure according to the custom of gavelkind (*a*), the above rules of descent are modified by the following:—

Gavelkind land descends to all males.

RULE. Gavelkind land descends to all males in

(*a*) See note at the end of this chapter.

equal degree in equal shares. (Third Report of the Real Property Commissioners, p. 9.)

"According to the custom of gavelkind, the partibility among heirs of the same degree extends to all degrees of remoteness." (*Per* Farwell, J., in *Re Chenoweth*, [1902] 2 Ch. at p. 497.)

The *jus representationis* applies to gavelkind lands. (*Hook* v. *Hook*, 1 H. & M. 43.)

Borough English.

In land held by socage tenure according to the custom of Borough English the rules of descent are modified as follows:—

Borough English land descends to youngest son.

RULE. Borough English land descends to the youngest son of the purchaser to the exclusion of his other children. (Third Report of the Real Property Commissioners, p. 8.)

"In some places this peculiar rule of descent is confined to the case of children; in others, the custom descends to brothers and other male collaterals." (Third Report of the Real Property Commissioners, p. 8.)

"The nature of that descent" [*i.e.*, descent according to the custom of Borough English] "is, that it substituted for the heir-at-law, in all cases, a different person as heir, but in all other respects it is regulated by the ordinary rules of descent." (*Per* Page-Wood, V.-C., in *Rider* v. *Wood*, 1 K. & J. at p. 656.)

Copyholds.

Copyhold land descends according to the custom of the manor.

Where land is held by copy of court roll at the will of the lord according to the custom of the manor, there is no uniform rule, and descent is traced according to the custom of the manor.

"Each manor has for itself a system of laws, to be sought in oral tradition, or in the court rolls or proceed-

ings of the customary court, kept often by ignorant and negligent stewards. . . . In the greatest number of manors the common law rule of descent prevails; but in some the land goes according to the custom of gavelkind, and in others according to the custom of Borough English; and in a few instances, if there be no son, to the eldest of several daughters." (Third Report of the Real Property Commissioners, p. 14.)

The custom of the manor has to be proved, and in so far as it is not proved to extend the descent follows the common law. Thus, in *Re Smart* (18 Ch. D. at p. 170), Bacon, V.-C., referring to the manor of Singleton in Sussex, said: "The custom of this manor is, that upon the death of a tenant, his youngest son, if there be one, shall take; if not, his youngest daughter, if there be a daughter; if not, his youngest brother or sister, uncle or aunt, if any such there be. But if there be none, there is an end of the custom. It is as if it had never existed, and the inheritance must descend according to the course of the common law." (See also *Muggleton* v. *Barnett*, 2 H. & N. 653.)

In the manor of Taunton Dene the widow is customary heiress. (*Hounsell* v. *Dunning*, [1902] 1 Ch. 512.)

In the manor of Sedgley, on the first descent after a surrender, the copyholds descend to the eldest son, if no surrender to the youngest son.

Customary Freeholds.

Customary freehold descends according to the custom of the manor.

"A tenure called customary freehold exists in many parts of the kingdom, especially in Cumberland, Westmoreland, a part of Lancashire called Oversands, the south-western parts of the counties of Durham and Northumberland, and the northern borders of Yorkshire. It is a base tenure, partaking to a considerable degree of the nature of copyhold; but the holding is generally declared to be according to the custom of the manor, without being at the will of the lord. . . . The customs in these manors vary considerably. . . . Among females of equal degree

the whole estate sometimes descends to the eldest, instead of being divided in coparcenary." (Third Report of the Real Property Commissioners, p. 20.)

The Descent of an Estate Tail.

Estate tail.

An estate in tail general (until it is barred) descends as an estate in fee simple would descend from the donee in tail, so long as any issue of the donee are in existence. But the line of descent may be restricted as to one sex, or to the issue of two named persons, or in other ways. An estate in tail male descends to males only, and does not descend to any male who traces his descent through a female. (*Bernal* v. *Bernal*, 3 My. & Cr. 559, 581.) An estate in special tail to the heirs of the body of two named persons only descends to the issue of such persons.

It is also possible to grant an estate tail to a man and the heirs of his body by a woman of a specified class or bearing a specified name. (*Page* v. *Hayward*, 2 Salk. 570; *Pelham Clinton* v. *Duke of Newcastle*, [1902] 1 Ch. 34; affd. [1903] A. C. 111.)

Where the land is subject to a special custom the estate descends according to such custom.

Copyholds.

Copyholds (not being within the Statute *De Donis Conditionalibus*) cannot be entailed unless there is a special custom to entail.

"To show that by custom an estate tail might be created, you must show that there have been surrenders in tail with remainders over, (for otherwise that may be a fee simple conditional) or that the lands had been enjoyed for such a length of time, have gone so long in a course of descent according to the limitation, as to exclude the supposition of a fee-simple conditional." (*Per* Lord Hardwicke, C., in *Moore* v. *Moore*, 2 Ves. sen. at p. 601.)

Estates pur auter vie.

Estates *pur auter vie.*

Where a man dies intestate as to an estate *pur auter vie*, which was limited to him and his heirs, the heir takes as special occupant. "The general doctrine as to

estates *pur auter vie* is plain enough. As to lands, if there is a lease to A. during the life of B., and A. dies living B., any person (at common law) who got possession of the land might hold it during the remainder of B.'s life as general occupant. But if the lease is to A. *and his heirs* during the life of B., then general occupancy is not permitted, and upon the death of A. the heir of A. would take. Now an heir, strictly speaking, can take by *descent* only an estate of *inheritance*, and it is, therefore, inaccurate to speak (though the expression is frequently used) of a descendible freehold not of inheritance. The heir in the case put takes not by *descent*; it is true, he takes it because he fills the character of heir; but he takes not as heir by *descent*, but as *special* occupant." (*Per* Kindersley, V.-C., in *Northen* v. *Carnegie*, 4 Drew. at p. 590; *Re Michell*, [1892] 2 Ch. 87.)

Under sect. 6 of the Wills Act, 1837, "In case there shall be no special occupant of any estate *pur auter vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate." Wills Act, s. 6.

"Now it must be admitted that where an estate *pur autre vie*, whether equitable or legal, is created without any designation of a special occupant, the law casts it in the event of the death of the grantee, upon the executor, and it is for those who say that it ought to go to the heir to show that there are some words in the creation of that equitable or legal estate *pur autre vie* which throw it upon a special occupant. It has long since been established that in determining the quality of an estate *pur autre vie*, that is whether it goes to a special occupant or to the executor by statute, you look to the terms of the last

conveyance of the estate, and not to the original grant, to ascertain whether it is to go to the heir or to the legal personal representative." (*Per* Lord Davey in *Mountcashell* v. *More-Smyth*, [1896] A. C. at p. 164; see also *Re Inman*, [1903] 1 Ch. 241.)

Quasi-entail.

Although estates *pur auter vie* are not entailable by virtue of *De Donis*, they can be limited so as to descend in a way resembling an estate tail. (*Mogg* v. *Mogg*, 1 Mer. 654.)

Note on Gavelkind.

Land in Kent is *primâ facie* of gavelkind tenure.

All land of socage tenure in the county of Kent is held according to the custom of gavelkind, unless it was held by military tenure prior to 12 Car. II. c. 24, or unless it has been disgavelled by Act of Parliament. This is the common law of Kent, and the custom need not be proved. (*Re Chenoweth*, [1902] 2 Ch. 488.) A list of the names of the persons whose lands have been disgavelled by Act of Parliament is given in Robinson on Gavelkind. As to the evidence to show that land has been disgavelled, see *Doe* d. *Bacon* v. *Brydges*, 6 Man. & G. 282.

Lands are also partible according to the custom of many manors, and also by custom in the case of some lands held by socage tenure (for details, see Robinson on Gavelkind, Book I., Chap. III.), but in such cases the custom has to be proved. The partibility of lands in Wales was abolished by 34 & 35 Hen. VIII. c. 26, ss. 91 and 128.

Robinson on Gavelkind also contains some information in relation to the custom of Borough English.

CHAPTER XVIII.

THE NEXT OF KIN.

Personal estate does not descend, but subject to the rights of the husband and wife, which have already been stated in Chaps. XV. and XVI., is distributed amongst the next of kin in accordance with a series of rules, which are mainly based on the Statutes of Distribution (22 & 23 Car. II. c. 10, and 1 Jac. II. c. 17).

The fifth, sixth and seventh sections of the former statute run as follows:—

The Statute of Distributions, s. 5.

"That all ordinaries and every other person who by this Act is enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates in manner and form following: that is to say, one-third part of the said surplusage to the wife of the intestate, and all the residue by equal portions, to and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of the said children be then dead, other than such child or children (not being heir-at-law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime, by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made: and in case any child, other than the heir-at-law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share which will be due to the other children by such distribution as aforesaid; then so much of the surplusage of the estate of such

Statute of Distributions.

intestate, to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal as near as can be estimated: but the heir-at-law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent, or otherwise from the intestate." (Sect. 5.)

Sect. 6.

"In case there be no children nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally to every of the next of kindred of the intestate, who are in equal degree and those who legally represent them." (Sect. 6.)

Sect. 7.

"That there be no representations admitted among collaterals after brothers' and sisters' children: and in case there be no wife, then all the said estate to be distributed equally to and amongst the children: and in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives as aforesaid, and in no other manner whatsoever." (Sect. 7.)

The general effect of the statute.

"The general effect of the provisions is, that (supposing there to be no wife) the estate, in case there are descendants, shall go between the children and their representatives; and in case there are no descendants, shall go amongst the next of kin or their representatives; and that the division is *per capita* where all the takers claim in their own right; and *per stirpes* where they, or some of them, claim as representatives of another person. It has long been settled that the word 'representatives' in this Act includes only 'descendants.'" (*Per* Wickens, V.-C., in *Re Ross's Trusts*, L. R. 13 Eq. at p. 292.)

General principle.

From these sections and the decisions the rules stated below may be deduced. The phrase "such persons as legally represent such children" means the living children of such children. The general principle is that nearest of

kin according to the degrees of the civil law take equally, subject to certain exceptions:—

Exceptions—

First.—That children of deceased children or deceased brothers and sisters can take by representation.

Secondly.—That brothers and sisters are preferred to grandparents.

Thirdly.—That where ascendants are husband and wife, the wife is entirely excluded.

Fourthly.—That the mother shares with brothers and sisters. (1 Jac. II. c. 17, s. 7.)

Method of calculating the degrees.

The degrees according to the civil law are calculated by taking the number of generations from one party up to the common ancestor and then down again to the other party. Thus, brothers are in the second degree, being one degree up to the father and one degree down again; an aunt and niece are in the third degree, being one degree up to the aunt's parent and then two degrees down to the niece. (See *per* Strange, M. R., *post*, p. 156.)

Half-blood.

There is no distinction between the half and the whole blood. (*Jessopp* v. *Watson*, 1 My. & K. 665.)

Posthumous child.

Posthumous children are considered as living for the purpose of the rules. Thus, a posthumous brother of the half-blood would share equally with a brother of the whole blood. (*Burnet* v. *Mann*, 1 Ves. sen. 156.)

The rules must not be read singly, but considered in the light of one another.

Subject to the rights of the widow the issue take the personalty *per stirpes*.

RULE. If a person dies intestate without leaving a husband but leaving issue, then, subject to the rights of the widow (if any), the personal estate is distributed among the issue *per stirpes*. *Provided* (a) the children of a living person do not take; (b) if any child shall have received any advance or (not being the heir-at-law) an estate by settlement from his father, the intestate, this shall be brought into hotchpot. (*Re Natt*, 37 Ch. D. 517.)

"If there are descendants but no children living to share the estate, it is to be divided into as many shares as there are children who have left living descendants, and that the descendants of each such child are to take as representing the child, and, of course, only the child's share." (*Per* Wickens, V.-C., in *Re Ross's Trusts*, L. R. 13 Eq. at p. 293.)

The hotchpot provisions.

"According to the Statute of Distributions, every child is bound to bring into hotchpot all advances made to him by an intestate in his lifetime, that there may be an equal distribution of the estate. The heir-at-law is excepted from that; but it is plain, from the latter part of the 5th section of the Act, that he is only excepted as to land derived from the intestate. Therefore, whenever an advance is made to the heir-at-law out of the personal estate he must bring that advance into account; but if he gets land only, he is not bound to bring it into account." (*Per* Malins, V.-C., in *Chantrell* v. *Chantrell*, 37 L. T. N. S. 220; quoted with approval by Porter, M. R., in *Re Lyons*, [1903] 1 Ir. 156.)

If borough English land descends to the youngest son as heir he need not bring it into hotchpot under the statute. (*Lutwyche* v. *Lutwyche*, Cas. t. Talb. 276.)

The hotchpot provisions apply where the intestate makes a will which becomes inoperative by reason of the death of all the beneficiaries in his lifetime (*Re Ford*, [1902] 2 Ch. 605); but "there is an existing rule that in the case of partial intestacy as to the beneficial interest the doctrine of hotchpot does not apply." (*Per* Neville, J., in *Re Roby*, [1907] 2 Ch. at p. 87; affd. [1908] 1 Ch. 71.) Nor do the hotchpot provisions apply where the intestate is the mother. (*Holt* v. *Frederick*, 2 P. Wms. 356; *Preston* v. *Green*, [1909] 1 Ir. 172.) The issue of a deceased child (who has been advanced) must bring advances made to their parents into hotchpot when they take by representation. (*Proud* v. *Turner*, 2 P. Wms. 560.)

The hotchpot provisions of the statute do not extend to brothers and sisters. Thus, children of a deceased sister

taking as representing their mother do not bring an advance made to her into hotchpot. (*Re Gist*, [1906] 1 Ch. 58; affd. [1906] 2 Ch. 280.)

As to the meaning of "advance," see *Taylor* v. *Taylor*, L. R. 20 Eq. 155; *Re Blockley*, 29 Ch. D. 250, and *Re Scott*, [1903] 1 Ch. 1.

Where no issue father takes.

RULE. If a person dies intestate leaving a father but no issue or husband, then the father takes the personal estate subject to the rights of the widow (if any). (22 & 23 Car. II. c. 10, s. 6; and see *Ratcliff's Case*, 3 Rep. at p. 40 a; *Blackborough* v. *Davis*, 1 P. Wms. at pp. 50, 51.)

Thus, in a case of total intestacy, the widow takes 500*l.* rateably out of the real and personal estate, and one moiety of the remainder of the personalty, and the father takes the other moiety. If no widow, the father takes all the personalty. The father and mother (if living) are the nearest of kin, both being in the first degree. The reason why the mother takes nothing seems to be that she is considered to be one person with her husband; apparently this rule has not been altered by the Married Women's Property Act, 1882.

When the mother takes.

RULE. If a person dies intestate leaving a mother but no father, husband, issue, brother, sister or children of a brother or sister, then subject to the rights of the widow (if any) the mother takes the personal estate. (*Jessopp* v. *Watson*, 1 My. & K. at p. 676.)

Here the mother is next of kin, being in the first degree, and 1 Jac. II. c. 17, s. 7, does not apply. (See next rule.)

The mother shares with brothers and sisters and children of deceased brothers and sisters.

RULE. If a person dies intestate leaving a mother but no father, husband or issue, then subject to the rights of the widow (if any), the personal estate is distributable equally between the mother,

the brothers and sisters living, and the children of deceased brothers and sisters, such issue taking *per stirpes*. (1 Jac. II. c. 17, s. 7; *Jessopp* v. *Watson*, 1 Myl. & K. 665; *Keylway* v. *Keylway*, 2 P. Wms. 344; *Stanley* v. *Stanley*, 1 Atk. 455.)

"If after the death of a father, any of his children shall die intestate without wife or children, in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her." (1 Jac. II. c. 17, s. 7.)

The representation does not extend beyond children of brothers and sisters. (*Pett's Case*, 1 P. Wms. 25; *Pett* v. *Pett*, 1 Salk. 250.)

Children of a deceased brother or sister represent their parents if there is another brother or sister of the intestate who survives.

RULE. Where an intestate dies leaving one or more brothers and sisters and also children of a deceased brother or sister, such children take by representation the share their parent would have taken if alive. (22 & 23 Car. II. c. 10, ss. 5, 6, 7; *Pett's Case*, 1 P. Wms. 25.)

Thus, if the intestate dies leaving no parents, issue, wife or husband, but leaving a niece, a nephew and two children of a deceased niece, the niece and nephew each take one-third, and the children of the deceased niece each take one-sixth.

"Where there are no ancestors or descendants, and the nearest of kin are brothers and sisters, but there are also children of dead brothers and sisters, the latter, though not of the next of kin, may claim as representatives of the brother or sister from whom they spring, and may stand in the place of that brother or sister for the purpose of distribution; so that the distribution is *per stirpes*. This privilege is expressly limited by the statute, and does not extend to any more remote descendants of brothers and sisters than their children, and does not apply at all to any case where the next of kin are all more

remote than brothers and sisters." (*Per* Wickens, V.-C., in *Re Ross's Trusts*, L. R. 13 Eq. at p. 293; *Stanley* v. *Stanley*, 1 Atk. at p. 456.)

No representation where no brother, sister or mother living.

Where there is no brother, sister or mother living the children of deceased brothers and sisters take *per capita*, because in that event they do not take by representation.

Thus, in *Lloyd* v. *Tench* (2 Ves. sen. 213), Sir J. Strange, M. R., says: "This is not the case of a brother or sister to the intestate, but of the children of the brothers or sisters, where there is no brother to bring up the issue of the other to a representation, but all stand in a proper degree, and take *per capita*, and not *per stirpes*, merely because they do not stand in light of representation. If there is one brother living and another has left children, however many, they take but a moiety with the brother: but if that brother had been dead, all in the same line of equality take *per capita*," and held that the intestate's personal estate was divisible in thirds between the aunt, the nephew and the niece. (2 Ves. sen. p. 215; see also L. R. 13 Eq. at p. 293.)

Brothers and sisters take before grandparents.

RULE. If a person dies intestate, then as between brothers and sisters and grandparents the brothers and sisters take the personalty to the exclusion of the grandparents. (*Evelyn* v. *Evelyn*, Amb. 191; 3 Atk. 762.)

The origin of this rule is unknown; it is contrary to the express words of the Statute of Distribution, since grandparents, equally with brothers and sisters, are of the second degree.

Remote kindred of equal degree take equally.

RULE. Where a person dies intestate, then subject to the foregoing rules all persons who stand in equal degree to the intestate take equally, except that where ascendants are husband and wife the wife is excluded. (*Durant* v. *Prestwood*, 1 Atk. 454.)

"It has been further settled that where all the persons entitled to claim are collaterals equally near of kin, for instance, second cousins twice removed, they take *per capita,* because they all take in their own right." (*Per* Wickens, V.-C., in *Re Ross's Trusts*, L. R. 13 Eq. at p. 293.)

Method of computation of degrees.

Thus, in *Lloyd* v. *Tench* (2 Ves. sen. 213), where the contest was between an aunt and the nephew and niece of the intestate, Sir J. Strange, M. R., said (p. 214): "Some things are so clear, they need only be mentioned: as first in all questions of the Statute of Distribution the rule to go by in computing the degrees of proximity of blood must be taken from the civil law; and on this ground and foundation stand all the cases which have come in judgment since the Statute of Distribution either at law or in this Court. Next that, computing the degrees in this case by the rule of the civil law, the three contending parties stand in equal degree as next of kin to the intestate, *viz.* each in a third degree; and the computation must be in this manner: as to the aunt the father is one degree, the grandfather a second, and the aunt a third: so as to the nephews and nieces the father is one, the brother two, and nephew and niece in the third degree."

Thus, a grandmother being of the second degree takes before an aunt, who is of the third. (*Ib.*)

An uncle being of the third degree takes before the son of a deceased aunt, who is of the fourth. (*Bowers* v. *Littlewood*, 1 P. Wms. 593.)

Grandparents.

As between grandparents, since a husband and wife are one person in law, if the next of kin were two grandfathers and a grandmother, it would seem that each grandfather would take a moiety; but it might be contended that the grandfather and grandmother, who were married, took one moiety between them. The point does not seem to be decided; probably the Married Women's Property Act, 1882, has not made any difference. (Compare *Re Jupp*, 39 Ch. D. 148.)

A grandfather on the father's side and a grandmother

on the mother's side share equally. (*Moore* v. *Barham*, 1 P. Wms. p. 53.)

If no kin Crown takes personalty.

RULE. If a person dies intestate leaving no husband or blood relations, then subject to the rights of the widow (if any) the personal property goes to the Crown (*Cave* v. *Roberts*, 8 Sim. 214), unless the intestate died domiciled in Cornwall, when it goes to the Duke of Cornwall. (*Solicitor of the Duchy of Cornwall* v. *Canning*, 5 P. D. 114.)

In such a case administration is granted to the Treasury Solicitor (the Treasury Solicitor Act, 1876), or where the King is entitled in right of his Duchy of Lancaster to the Solicitor of the Duchy of Lancaster. (For details, see Robertson on Civil Proceedings by and against the Crown, p. 495.)

Executors take to the exclusion of the Crown.

If, however, the deceased has appointed executors, then in the absence of a contrary intention the executors take the undisposed-of residue of the personal estate, since the Executors Act, 1830, does not apply when there are no next of kin (sect. 2); see Chapter IX., p. 78.

CHAPTER XIX.

CONVERSION.

Fletcher v. *Ashburner.*

It might be supposed that where property passed under an intestacy, that the relative rights of the heir-at-law and the next of kin would depend upon the actual nature of the property—real or personal—at the date of the death. But this is not so. Courts of Equity did not permit the rights of persons to be varied because the nature of the property had not been changed in accordance with a binding trust to convert it. Equity acted as if what ought to have been done had been done. Consequently we have the following rule:—

Fletcher v. *Ashburner.*

RULE. "Money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted." (*Per* Sir T. Sewell, M. R., in *Fletcher* v. *Ashburner*, 1 Br. C. C. at p. 499.)

A mere declaration does not cause conversion.

To effect a conversion there must be an imperative trust or direction to convert. "A mere declaration that personalty shall devolve or pass to persons successively as realty is in itself inoperative, for the whole doctrine of conversion turns on the maxim that equity considers to have been done what ought to have been done pursuant to the trust; and a mere declaration such as I have mentioned creates no obligation as to dealing with the property in one way or another." (*Per* Parker, J., in *Re Walker*, [1908] 2 Ch. at p. 712.)

An absolute order for sale made within the jurisdiction of the Court in an administration suit, operates as a conversion from the date of the order and before any sale has taken place. (*Fauntleroy* v. *Beebe*, [1911] 2 Ch. 257.) Order for sale in administration action.

"If a conversion is rightfully made, whether by the Court or a trustee, all the consequences of a conversion must follow: and that there is no equity in favour of the heir or any one else to take the property in any other form than that in which it is found." (*Per* Jessel, M. R., in *Steed* v. *Preece*, L. R. 18 Eq. at p. 197; followed in *Burgess* v. *Booth*, [1908] 2 Ch. 648.)

A notice to treat under the Lands Clauses Consolidation Act, 1845, does not operate as a contract, but it does so soon as the purchase-money is agreed (*Watts* v. *Watts*, L. R. 17 Eq. 217); but until the purchase is completed it seems that the rents are treated as unconverted. (*Ib.*) Notice to treat.

Where the purchase-money is paid into Court, and belongs to parties under a disability, it is liable to be re-invested in land so that there is a constructive reconversion. Thus, in *Kelland* v. *Fulford* (6 Ch. D. 491), where land of an infant had been taken by a railway company, Jessel, M. R., after discussing the terms of sect. 69 of the Lands Clauses Consolidation Act, 1845, says: "Till the person becomes entitled to the money to his or her own use there is a constructive reconversion, which he or she on becoming so entitled can always stop, but until that event happens the money is to be laid out in lands or buildings to stand limited to the same uses as the lands sold stood limited, and therefore must be considered as land. I hold, therefore, that there has been a reconversion of this fund; that it is still real estate, and that consequently it belongs to the infant's heir-at-law" (p. 495: see also *Re Tugwell*, 27 Ch. D. 309). Constructive reconversion.

Where property belonging to a person who is under a disability, such as lunacy or infancy, is taken compulsorily, the general principle is that for the purpose of devolution its nature is not altered. Person under disability.

"There seems to me to be a broad general principle underlying all these questions, which is this, that where

property is taken compulsorily from any person who is not *sui juris*, and who is not competent to make the subsequent alteration in the disposition or the devolution of that property, which would naturally follow such a change, the presumption is, if the words of the Act of Parliament really admit of that interpretation, that the Legislature did not intend to interfere with any legal rights or any legitimate expectations of any persons whatsoever" (*per* James, L. J., in *Re Barker*, 17 Ch. D. at p. 243; quoted by Eady, J., in *Herbert* v. *Herbert*, [1912] 2 Ch. at p. 275; *Hopkinson* v. *Richardson*, [1913] 1 Ch. 284); but an order for sale of property made in a partition action operates as a conversion of the share of a person *sui juris* as from the date of the order, and, therefore, on the death before sale of the person entitled, his share of the unsold real estate will devolve as personalty. (*Re Dodson*, [1908] 2 Ch. 638; *Herbert* v. *Herbert*, [1912] 2 Ch. 268.)

Sale in partition action.

The share of an infant, however, in land sold in a partition action, even if the infant is plaintiff by his next friend, is not converted as against the heir-at-law of the infant, if the latter does not attain twenty-one. (*Re Norton*, [1900] 1 Ch. 101.)

Sale under Lunacy Act, 1890.

Where land of a lunatic is sold under the Lunacy Act, 1890, sect. 123 (1) of the Act provides that: "The lunatic, his heirs, executors, administrators, next of kin, devisees, legatees, and assigns, shall have the same interest in any moneys arising from any sale, mortgage, or other disposition, under the powers of this Act which may not have been applied under such powers, as he or they would have had in the property the subject of the sale, mortgage, or disposition, if no sale, mortgage, or disposition, had been made, and the surplus moneys shall be of the same nature as the property sold, mortgaged, or disposed of."

Capital money under Settled Land Acts.

It will be remembered that capital money arising under the Settled Land Acts and the investments representing the same are considered as land for all purposes of disposition, transmission and devolution. (Settled Land Act, 1882, s. 22 (5).) But it has been held that where

land under a settlement would have escheated to the Crown if unsold, the proceeds of sale, where the land has been sold under the powers of the Settled Land Acts, go to the Crown as *bona vacantia*. (*Re Bond*, [1901] 1 Ch. 15.)

Election.—The parties interested in the property to be converted may, however, if they all agree and are *sui juris*, elect to take it in its unconverted state.

Election to take in specie.

"To establish an election to take 'in specie' and free from a trust to convert, I think it is necessary to have sufficient evidence of the election to be derived from declarations or acts and conduct of the parties, and where it is sought to establish such an election by a person or persons only entitled so to elect subject to the rights of third persons to insist upon a sale, it must be shown in like manner that such persons have assented." (*Per* Byrne, J., in *Re Douglas and Powell's Contract*, [1902] 2 Ch. at p. 312.)

Lawes v. *Bennett.*

The case of *Lawes* v. *Bennett* has given rise to the following anomalous rule:—

Lawes v. Bennett.

RULE. Where the deceased has given to another an option to purchase land of the deceased and this option is exercised after the death of the deceased, the proceeds of sale devolve as part of the deceased's personal estate. (*Lawes* v. *Bennett*, 1 Cox, 167; *Weeding* v. *Weeding*, 1 J. & H. 424; *Re Isaacs*, [1894] 3 Ch. 506.)

The constructive conversion, however, only takes place from the date of the exercise of the option, so that the heir or devisee takes the intermediate rents. (*Townley* v. *Bedwell*, 14 Ves. 591.)

Will may exclude rule.

If, however, the option is prior to the will, and the property subject to it is specifically devised, this is sufficient to negative the operation of the rule.

"When you find, that, in a will made after a contract giving an option of purchase, the testator, knowing of the existence of the contract, devises the specific property which is the subject of the contract, without referring in any way to the contract he has entered into, there it is considered that there is sufficient indication of an intention to pass that property to give to the devisee all the interest, whatever it may be, that the testator had in it." (*Per* Wood, V.-C., in *Weeding* v. *Weeding*, 1 J. & H. at p. 431; quoted by Stirling, J., in *Re Pyle*, [1895] 1 Ch. at p. 727.)

Ackroyd v. *Smithson*.

In addition to the cases where the deceased's property is subject to a trust for conversion, there are cases where the testator himself directs a conversion for a purpose which fails. The leading case on this subject is celebrated for the argument of Lord Eldon (then Mr. Scott). The rule is—

Ackroyd v. *Smithson*.

RULE. "Where real estate is directed to be converted into personal, for a purpose expressed, which purpose fails, either wholly, or partially, in the former case, though the estate has been converted, the whole produce of that conversion will still be real estate; and in the latter, as far as the purpose fails, so far the money is to be considered realty, and not personalty." (*Per* Lord Eldon, C., in *Hill* v. *Cock*, 1 V. & B. at p. 174; *Ackroyd* v. *Smithson*, 1 B. C. C. 503.)

If purposes of conversion fail, property retains its original nature.

"Conversion must be considered in all cases to be directed for the purposes of the will, and is limited by the purposes and exigencies of the will. If therefore the real estate be directed to be sold, with a view to a disposition made by a will, and that disposition fails, although the real estate has *de facto* been sold, yet the proceeds will retain the quality of real estate for the

purpose of ascertaining the ownership, that is, the title of the heir; although it is true that when you pay it over to the heir, in the hands of the heir it has the character of money, and no longer the character of real estate. So, in like manner, if money is directed to be invested in land, and the land is disposed of by the will, and the money is so invested, but the disposition fails, the investment thus made for the purposes of the will has no effect in altering the quality of the property; but the property, even in the shape of lands, retains its pristine and original quality of personal estate, for the purpose of determining the ownership." (*Per* Lord Westbury, C., in *Bective* v. *Hodgson*, 10 H. L. C. at p. 667.)

Where land is directed to be converted into money for purposes which fail, it is necessary to determine whether the heir takes the property as personalty or as realty.

Where partial failure, heir takes as personalty.

"Where there is a partial undisposed interest of real estate directed to be sold, that interest results to the heir of the testator and it becomes personal estate in his hands; of course, so long as he is alive it is immaterial whether it is real or personal estate; but on his death it seems to me, that on principle as well as by virtue of the authorities which are summarised in Jarman on Wills [4th ed. Vol. I. p. 630], that the proposition I have just stated is correct, and I do not remember in my experience to have heard it questioned. There is the other proposition, namely, that, if the purposes of the direction for conversion in the will wholly fail—that is, if all the legatees of the moneys to be produced by the sale die in the testator's lifetime, so that there is a total failure of the objects for which the conversion was to be made—the property will devolve upon the heir as real estate." (*Per* Chitty, J., in *Re Richerson*, [1892] 1 Ch. at p. 381; see also the statement of the principle by Leach, M. R., in *Smith* v. *Claxton*, 4 Madd. at p. 492.)

Where total as realty.

The Distinction between Real and Personal Estate.

Since real and personal estate devolve in different ways the distinction between them is of great practical

Terms of years are personal estate.

importance. Broadly, real estate is immoveable, personal estate is moveable property, subject to the important exception that terms of years in real estate (or chattels real, as they are called) are personal property. The following short notes, which deal with some of the cases which most frequently have to be considered, may be found useful:—

Advowsons are real property.

Advowsons.—Advowsons are real property, but if the church is vacant and the owner of the advowson dies before presenting, the right of presentation belongs to the personal representative as personal property. (Williams on Executors, p. 509.)

Annuities—

Annuities.—"Annuities by way of rent-charge are frequently granted to a person and his heirs for a life or lives. . . . When such annuity is derived out of, and depends, on a freehold interest, the annuity will, on intestacy, be transmissible, and belong to heirs, and not to executors or administrators: at least such is the opinion entertained on mature deliberation. But every annuity granted out of a chattel interest will be a chattel interest, although it be limited to a grantee and his heirs for a life or lives. An interest which in its nature is a chattel real cannot be rendered transmissible to heirs." (Preston on Abstracts, quoted by Byrne, J., in *Re Fraser*, [1904] 1 Ch. at p. 116.)

granted out of chattel interest are personalty;

but may descend to the heir.

A perpetual annuity may be granted out of personalty to a man and his heirs which descends to the heir but is personal estate. (*Radburn* v. *Jervis*, 3 Beav. 450.)

Growing corn is personalty,

Emblements.—Corn and other annual crops which grow "by the industry and manurance of man," which are growing on the deceased's land at his death form part of his personal estate. The doctrine does not extend to apples and other fruit grown on trees; it applies to a "crop of that species only which ordinarily repays the labour by which it is produced, within the year in which that labour is bestowed, though the crop may, in extra-

but not fruit on trees.

ordinary seasons, be delayed beyond that period." (*Per* Denman, C. J., in *Graves* v. *Weld*, 5 B. & Ad. at p. 118.)

But "unless there is a bequest showing that the emblements are to be taken apart from the land, they pass to the devisee of the land." (*Per* Bramwell, B., in *Cooper* v. *Woolfitt*, 26 L. J. (N. S.) Ex. at p. 314.)

As between the heir and executor, or the executor and the issue, the emblements belong to the executor; but as between an executor and a devisee, the emblements belong to the devisee, unless they are expressly bequeathed.

Fixtures.—Articles attached to and intended to form part of the house or land pass with the land to the heir.

"Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the *onus* of showing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the *onus* lying on those who contend that it is a chattel." (*Per* Lord Blackburn in *Holland* v. *Hodgson*, L. R. 7 C. P. at p. 335: quoted by Joyce, J., in *Re Chesterfield's Settled Estates*, [1911] 1 Ch. at p. 242.)

"One principle, I think, has been established from the earliest period of the law down to the present time, namely, that if something has been made part of the house it must necessarily go to the heir, because the house goes to the heir, and it is part of the house. That seems logical enough. Another principle appears to be equally clear, namely, that where it is something which, although it may be attached in some form or another . . . to the walls of the house, yet, having regard to the nature of the thing itself, and the purpose of its being placed there, is not intended to form part of the realty, but is only a mode of enjoyment of the thing while the person is tem-

porarily there, and is there for the purpose of his or her enjoyment, then it is removeable and goes to the executor." (*Per* Lord Halsbury, C., in *Leigh* v. *Taylor*, [1902] A. C. at p. 158; see also *Re Whaley*, [1908] 1 Ch. 615.)

Certain heirlooms are realty,

Heirlooms.—A few chattels pass to the heir as heirlooms. "These are of two classes. The first is where they pass by special custom, such as the best bed and the like. The second is where the chattels, to use the old phrase, savour of the inheritance: that is are directly connected with it. This class includes title-deeds and the chest or box where they are usually kept, the patent creating a dignity, the garter and collar of a knight, an ancient horn where the tenure is by cornage, as in the case of the Pusey horn, and the ancient jewels of the Crown." (*Per* Chitty, L. J., in *Hill* v. *Hill*, [1897] 1 Q. B. at p. 494.)

e.g., title deeds.

Partnership property is personalty in equity.

Partnership property.—Land forming part of the assets of a partnership is considered as personalty in equity. "It is admitted on all hands that real property belonging to a firm is impressed by the law of England with the character of personalty." (*Per* Lord Coleridge, C. J., in *Att.-Gen.* v. *Hubbuck*, 13 Q. B. D. at p. 278.) This is now positively enacted by sect. 22 of the Partnership Act, 1890: "Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators, as personal or moveable and not real or heritable estate."

Partnership Act, 1890, s. 22.

Rights of action.—Rights of action for breach of contract causing loss or damage to the deceased's estate pass to the legal personal representative, but in general rights of action for tort die with the person. (*Bowker* v. *Evans*, 15 Q. B. D. 565.) The maxim is *Actio personalis moritur cum persona.* This maxim is abolished in the case of injuries to the deceased's personal estate by 4

Actio personalis moritur cum persona. Exceptions.

Edw. III. c. 7, and injuries done to his real estate within six months prior to the death by 3 & 4 Will. IV. c. 42. Under Lord Campbell's Act (9 & 10 Viet. c. 93), where a person is killed by the neglect or default of another an action lies for the benefit of the wife, husband, parent or child of the person so killed. Under the Workmen's Compensation Act, 1906, compensation is payable to the dependants of a workman killed by an accident arising out of or in the course of his employment.

Shares are personalty.

Shares.—Shares in companies are in general personal estate, but there are a few companies the shares in which are real estate. The shares in companies incorporated under the Companies Acts are personal estate. (Companies (Consolidation) Act, 1908, s. 22.)

Trees go with the land unless severed.

Trees.—Trees form part of the soil unless they are completely severed.

"A tree may be absolutely dead and yet undoubtedly form part of the soil. So the question of the life of the tree seems immaterial. The question, and the only question, put in the baldest and broadest form is, whether or not the tree is affixed to the soil. If it is, it is realty, but if it is severed, it is personalty." (*Per* Lord Halsbury, C., in *Re Ainslie*, 30 Ch. D. at p. 487.)

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